No. [redacted]

No. 14972

JOHN T. FEY, Clerk

United States
Court of Appeals
for the Ninth Circuit

JAMES F. CRAFTS,

Appellant,

vs.

FEDERAL TRADE COMMISSION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —1-20-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
405 Montgomery Street,
San Francisco, California,

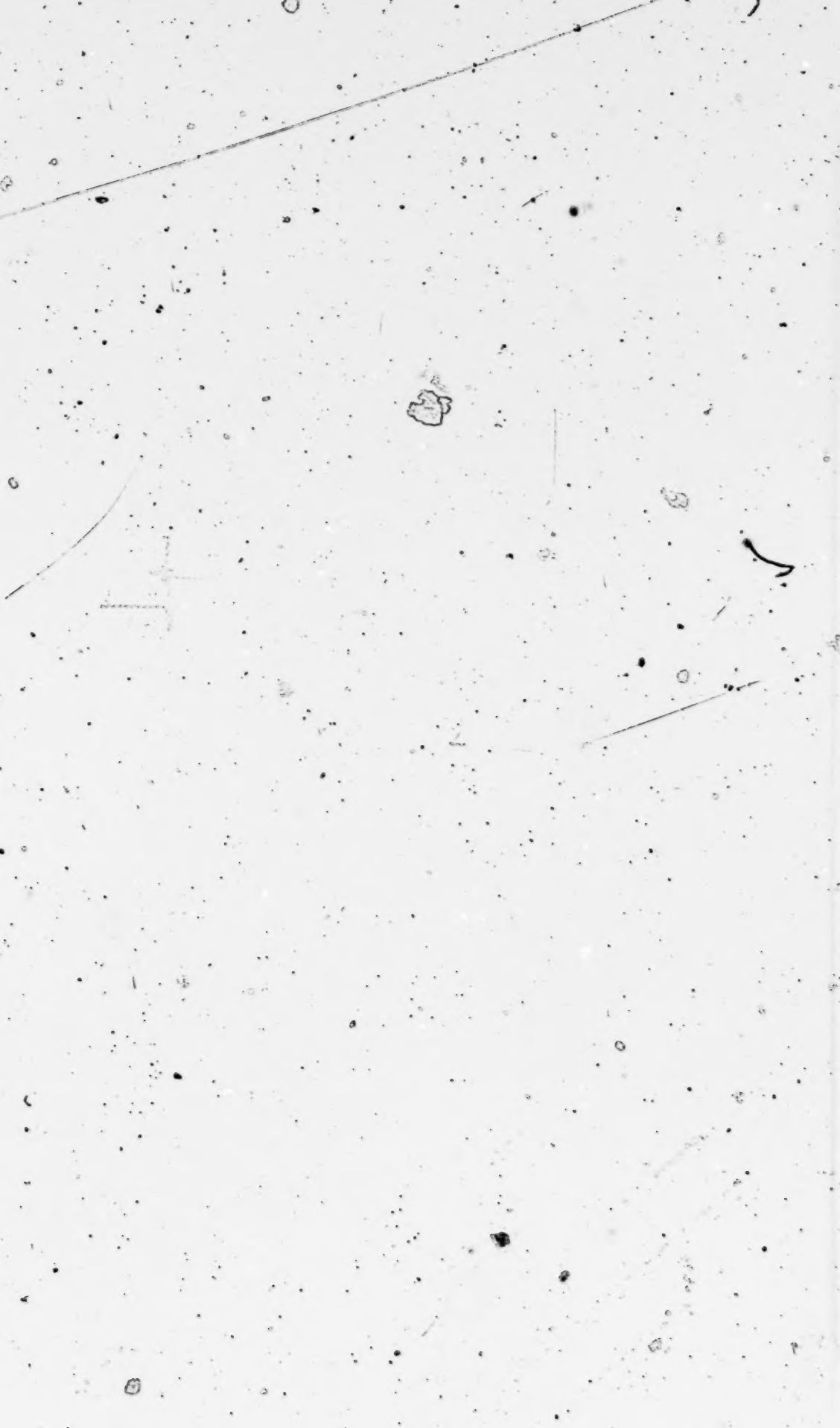
Counsel for Appellant.

ROBIN B. DAWKINS,
Asst. Genl. Counsel;

JAMES E. CORKEY,
Attorney, Federal Trade Commission,
Washington 20, D. C.;

JOHN W. BROOKFIELD, JR.,
Federal Trade Commission,
Federal Office Building,
Fulton and Hyde Streets,
San Francisco, California,

Counsel for Appellee.



In the District Court of the United States for the Northern District of California

34986

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

JAMES F. CRAFTS,

Defendant.

APPLICATION FOR AN ORDER REQUIRING THE GIVING OF EVIDENCE (AND THE PRODUCTION OF DOCUMENTARY EVIDENCE)

To the Honorable Judges of the District Court of the United States for the Northern District of California:

The Federal Trade Commission (hereinafter referred to as the petitioner), pursuant to the authority conferred upon it by the provisions of Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A., Sec. 49), respectfully applies to this Honorable Court for an order requiring James F. Crafts to appear before the petitioner or an examiner now or subsequently designated by it, and answer questions and produce documentary evidence relevant and material to and necessary and proper to the conduct of the proceeding hereinafter mentioned entitled "In the Matter of Fireman's Fund

Indemnity Company, Docket No. 6310," and in support of such application shows as follows:

Paragraph One: On March 11, 1955, the petitioner issued its complaint against Fireman's Fund Indemnity Company alleging therein that the petitioner has reason to believe that said respondent in said complaint had been and was still violating the provisions of the ~~Federal~~ Trade Commission Act. A copy of the said complaint is attached hereto and by this reference incorporated herein.

On September 2, 1955, respondent filed an answer to said complaint, and the petitioner thereafter designated J. Earl Cox, a hearing examiner of the petitioner, to take testimony and receive evidence in said proceeding and to perform all other duties authorized by law in the prosecution of the said inquiry.

Paragraph Two: On September 22, 1955, the petitioner, through the said hearing examiner, issued and thereafter seasonably caused to be served upon the said James F. Crafts, a subpoena requiring his presence at 10:00 o'clock a.m., October 17, 1955, before the said J. Earl Cox, hearing examiner, in San Francisco, California, to testify at the instance of the petitioner in the aforesaid proceeding instituted by the petitioner against Fireman's Fund Indemnity Company, and further requiring him to bring with him and produce at said time and place certain books, papers and documents identified and described therein. A copy of the said subpoena is attached hereto and incorporated herein.

The said hearing was adjourned from 10:00 o'clock a.m., to 1:00 o'clock p.m., on the same date and at the same place, and counsel for respondent and the witness, on the record, stated that both he and the witness had knowledge of said continuance.

The place of said hearing is within the jurisdiction of this Court.

Paragraph Three: At the hour to which the hearing had been continued on October 17, 1955, and at the place fixed in said subpoena, a hearing was duly convened by the said hearing examiner, J. Earl Cox, at which time and place the said James F. Crafts appeared but refused to answer questions relevant and material to, and necessary and proper to the conduct of, the proceeding herein mentioned, and the said James F. Crafts has continued to refuse to answer said questions.

And at the time and place hereinabove referred to at which said James J. Crafts appeared as hereinabove stated, said witness failed and refused to produce any of the documentary evidence which was required by the said subpoena and has continued to fail and refuse to produce same although the petitioner avers, upon information and belief, that the said James F. Crafts was and is well able to do so.

Paragraph Four: Section 9 of the Federal Trade Commission Act provides in part as follows:

> "That for the purposes of this Act the commission, or its duly authorized agent or agent

shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and

any failure to obey such order of the court may be punished by such court as a contempt thereof."

and the Commission has, by its rules of practice, delegated the authority to issue subpoenas to its hearing examiners.

Wherefore: the petitioner invokes the aid of this Honorable Court in requiring the attendance and testimony of, and the production of documentary evidence by, said James F. Crafts in the aforementioned proceeding, and prays this Honorable Court to issue an order requiring the said James F. Crafts to appear before the said J. Earl Cox, hearing examiner, or such other examiner as petitioner may designate subsequent hereto, at a time and place designated by the petitioner within the jurisdiction of this Honorable Court, and give such testimony and evidence as may be relevant and material to, and necessary and proper to the conduct of, the said proceeding, and produce the documentary evidence which the said James F. Crafts has failed to produce.

And for such other and further relief as may be just in the premises.

Respectfully submitted,

/s/ JOHN W. BROOKFIELD, JR.,
Attorney for the Federal
Trade Commission.

Dated: Oct. 18, 1955.

Duly verified.

United States of America Before
Federal Trade Commission

Docket No. 6310

In the Matter of:

FIREMAN'S FUND INDEMNITY COMPANY,
a Corporation.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fireman's Fund Indemnity Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent, Fireman's Fund Indemnity Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 410 California Street, San Francisco, California.

Paragraph Two: Respondent is now, and for

more than two years last past has been, engaged as an insurer in the business of insurance in commerce, as "commerce" is defined in the Federal Trade Commission Act, by entering into insurance contracts with insureds located in various States of the United States in which the business of insurance is not regulated by state law to the extent of regulating the practices of respondent alleged in this complaint to be illegal. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said insurance policies in commerce between and among the several States of the United States.

Respondent, during the two years last past, has sold insurance indemnification in a variety of policies, among which are the following:

1. The Basic Equity Accident Policy (No. BA).

2. The Basic Income Equity Accident Policy (No. BAI).

3. The Basic Equity Life and Limb Accident Policy (No. BAL).

4. The Basic Health Policy (No. BHP).

5. The Budget Hospital and Medical Policy (No. GMA).

6. The Hospital Nurses and Expense Policy (No. HNE).

7. Hospital and Medical Policy (No. HHM).

8. Polio Policy (No. PS).

Paragraph Three: Respondent is licensed, as provided by the respective State laws, to engage in the business of insurance, as heretofore generally described, in all of the forty-eight States of the United States and the District of Columbia.

Paragraph Four: In the course and conduct of its aforesaid business, respondent, during the two years last past, disseminated, and caused to be disseminated, in the form of printed and written matter, false, misleading and deceptive advertising statements concerning the terms and provisions of its contracts of insurance, as reflected by policies as aforesaid. These statements were disseminated by letters, bulletins, circulars, etc., through the United States mail and by other means; or through its agents in commerce, between and among the various States of the United States. The purpose and effect of these statements was and is to induce members of the public to become insured by the respondent under the terms and provisions of the policies advertised.

Paragraph Five: In the course and conduct of its said business in said commerce, as aforesaid, the respondent has disseminated, among others of similar import and meaning, not herein set out, advertisements relating to its said policies containing the statements hereinafter set forth:

1. "Available to Males ages 18-54 . . . Females 18-54 . . . Renewable to age 70."

2. "A Perfect Combination for Full Coverage Disability Insurance."

"Let Accident and Health Insurance Protect Your Income as Fire Insurance Protects Your Home."

"Adequate Sickness Protection Combined With Sound Accident Insurance."

"Basic Coverages

Hospital Confinement cases:

Benefits Plan A

1. Hospital room and board for a period not exceeding 100 days for any one disease or injury,
   Adults, per day up to.....$ 5.00
   Children, per day up to.....$ 4.00
2. Actual expense incurred for operating room, anaesthesia, anaesthetist's fee, drugs, dressings, diagnostic X-ray and laboratory examinations, up to an aggregate maximum of.....$100.00

Ambulance Expense:

Transportation to or from the hospital, up to.....$15.00"

"Optional Coverages

Surgical Operation Expense:

Whether at hospital, doctor's office or home, schedule up to.....$250.00
Housewives and Unemployed Females $187.50

Doctor's Visits During Hospital Confinement
In non-surgical cases, reimbursement will be made for physician's fees up to a maximum of 100 days for each disease or injury, per day up to.....$3.00"

4. "Loss of Business Time Weekly Income up to 52 Weeks
Confining Illness Coverage from first day or with waiting period of 7, 14, 21 or 28 days."

Paragraph Six: Through the use of such statements and representations, and others of similar import and meaning, not specifically set out herein, the respondent represents and has represented directly or by implication, with respect to said policies of insurance, as follows:

1. That the policies providing indemnification against loss caused by accident or sickness may be continued at the option of the insured to a specific age or for life as long as the insured makes such premium payments within the time and in the amounts as are required by the terms of the policy.

2. That complete indemnification is provided for any or all sicknesses, illnesses or accidents suffered by the insured.

3. (a) That indemnification is provided in the form of cash benefits for the payment of hospital room and board at the rate of $5.00 per day for a period not to exceed 100 days for any one disease or injury which may be suffered by the insured.

(b) That indemnification in the form of cash benefits in an amount up to $250.00 is provided for surgical expense incurred by the insured as a result of illness or injury.

(c) That indemnification is provided for doctors' visits in non-surgical cases during hospital confinement at the rate of $3.00 per day for a maximum 100 days for each sickness or injury suffered by the insured.

1. That indemnification is provided for any confining sickness which may be suffered by the insured during the policy term from the first day of such sickness or after a waiting period of 7, 14, 21, or 28 days as the policy may prescribe.

Paragraph Seven: The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Contrary to the statements made in paragraph 1 of Paragraph Five, respondent's policies may not be renewed at the option of the insured until the age of 70 years or any other specific age by the timely payment of premiums in the amounts required by such policies. On the contrary, respondent's policies provide, in effect, that they are subject to cancellation by the respondent at any time for any reason or for no reason at all.

2. Contrary to the statement made in subparagraph 2 of Paragraph Five concerning respondent's Basic Health Policy and Basic Equity Accident Policy, the insured is not provided with complete

indemnification by such policies against any loss which may be incurred by reason of any or all sicknesses or accidents. For example, Respondent's Basic Health Policy provides, (a) in effect, that no cash benefits are payable for any loss due to sickness the cause of which is traceable to a condition existing prior to or within 15 days after the effective date of the policy; (b) any loss due to pregnancy, childbirth or miscarriage; and (c) suicide or any attempt threat, death, disability or other loss caused or contributed to, by disease or infection (except pyogenia infection) or injury sustained by the insured while in or on any aircraft or other device for air travel. Total disability benefits are only provided if the disability wholly and continuously disables the insured and prevents the insured from performing each and every duty pertaining to his occupation. Further, such total disability must occur within 30 days of the date of the accident.

3. Contrary to the statements made in subparagraph 3 of Paragraph Five:

(a) Respondent's Hospital and Medical Expense Policy (as referred to in subparagraph 3(1) of Paragraph Five) does not provide indemnification for hospital room and board for a period not to exceed 100 days for any one disease or injury. On the contrary, such policy does not cover losses resulting from any illness the cause of which is traceable to a condition existing prior to or within 30 days of the effective date of the policy. Further, the policy does not provide for the payment of cash benefits for losses resulting from insanity, preg-

nancy or childbirth, or any condition resulting therefrom; intentional self-inflicted injuries; or operations for removal of tonsils or adenoids, or both, upon children up to the age of 18; unless the policy has been in effect for at least 12 consecutive months. Also, it is to be noted that the policy provides that benefits payable thereunder shall be reduced 25% when the insured reaches 60 years of age and 50% when the insured reaches 65 years of age.

(b) Respondent's Hospital and Medical Expense Policy does not cover any surgical expense which may be suffered by the insured by reason of sickness or accident in all cases to a maximum of $250.00. The surgical benefits provided by the policy, if payable at all, are limited to the maximum amounts stated in the schedule of operations (Rider Form MSE) contained in the policy. This schedule lists 114 different types of operations. A maximum of $250.00 will be payable for surgical fees for only four of these types of operations. A maximum of $75.00 or less is provided for 90 of the listed types of operations.

(c) Respondent's Hospital and Medical Policy does not provide indemnification for doctors' visits to the insured during hospital confinement in all non-surgical cases. Instead, such policy excludes indemnification for this expense in many instances for the reasons previously stated in subsection (a) of this section.

4. Contrary to the statements contained in sub-

paragraph 4 of Paragraph Five (which refer to respondent's Basic Health Policy) indemnification is not provided for the first day of any illness which may be contracted by the insured during the policy term. Instead, such policy excludes payment for losses resulting from any sickness the cause of which originates on or prior to fifteen days after the effective date of the policy.

Paragraph Eight: The use by the respondent of the aforesaid false and misleading statements and representations with respect to the terms and conditions of its said policies and its failure to reveal the limitations of said coverage found in said policies have had and now have the tendency and capacity to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and representations were and are true and to induce said portion of the purchasing public to purchase insurance coverage from the respondent because of said erroneous and mistaken belief.

The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, the Premises Considered, the Federal Trade Commission, on this 11th day of March, A.D. 1955, issues its complaint against said respondent.

Notice

Notice is hereby given you, Fireman's Fund Indemnity Company, respondent herein, that the 5th day of May, A.D. 1955, at 10 o'clock is hereby fixed as the time and San Francisco, California, as the place when and where a hearing will be had before J. Earl Cox, a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. Such answer shall contain a concise statement of the facts which constitute the ground for defense and shall specifically admit or deny each of the facts alleged in the complaint unless you are without knowledge, in which case you shall so state. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be

true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or of law under Rule XXI, and the right to appeal under Rule XXIII.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission and Hearing Examiner J. Earl Cox, without further notice, to find the facts to be as alleged herein and to issue the following order in this proceeding:

It Is Ordered that the respondent, Fireman's Fund Indemnity Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any accident, health, hospital, or surgical insurance policy, do forthwith cease and desist from:

A. Representing, directly or by implication:

(1) That said insurance policy may be continued in effect indefinitely for life, or for any period of time when, in fact, said policy provides that it may be cancelled by respondent or terminated under cir-

cumstances over which insured has no control, during the period of time represented.

(2) That said policy provides indemnification to the insured in cases of sickness or accident generally or in any or all cases of sickness or accident, when such is not the fact.

(3) That said policy provides indemnification for loss of life, sight, or limb, hospital expenses, surgeon's fees, doctor's visits, or any or all other medical, surgical, or hospital expenses in any or all cases of sickness or accident which are in excess of what is actually provided.

(4) That said policy will pay in full or in any specified amount, or will pay up to any specified amount for hospital expenses, surgeon's fees, doctor's visits, or any or all other medical, surgical, or hospital expenses in any or all cases of sickness or accidents unless the policy provides that the actual cost to the insured for such service or services will be paid in all cases up to the amount represented.

(5) That said policy provides indemnification beginning from the first day of illness or accidental injury in any or all cases generally, when such is not the fact.

B. Misrepresenting in any other manner or by any other means the terms or provisions of said insurance policies.

The inclusion of such order to cease and desist in this complaint will be without effect in the event you

show cause, on or before the 5th day of May, A.D. 1955, why such order should not issue.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 11th day of March, A.D. 1955.

By the Commission.

[Seal] /s/ ROBERT M. PARRISH,
Secretary.

United States of America
Federal Trade Commission

SUBPOENA DUCES TECUM

To Mr. James F. Crafts, Fireman's Fund Indemnity Company, 401 California Street, San Francisco 20, California.

You are hereby required to appear before J. Earl Cox, a Hearing Examiner of the Federal Trade Commission, at Room 261, U. S. Post Office and Court House, 7th and Mission Streets in the City of San Francisco, California, on the 17th day of October, 1955, at ten o'clock a.m., of that day, to testify at the instance of the Federal Trade Commission in the Matter of Fireman's Fund Indemnity Company, Docket No. 6310, and you are hereby required to bring with you and produce at said time and place

the following books, papers, and documents: described in Schedule "A" attached hereto and incorporated by reference as if fully rewritten herein.

Fail not at your peril.

In testimony whereof, the undersigned, a Hearing Examiner of the Federal Trade Commission, has hereunto set his hand and the said Federal Trade Commission has caused its seal to be affixed at Washington, D. C., this 22nd day of September, 1955.

[Seal] /s/ J. EARL COX.
Hearing Examiner.

Schedule "A"

1. One copy of each form letter, bulletin, circular, folder, brochure, stuffer, newspaper advertisement, magazine advertisement, or other written or printed advertising material which was disseminated by respondent Fireman's Fund Indemnity Company (hereinafter described in this Schedule "A" as respondent) to the general public, or to its employees or agents for dissemination to the general public or which was disseminated to the general public by any person, partnership, or corporation with the permission of, request of, order by, or under the terms of any contract with the respondent from March 1, 1954, to date, which advertised, described, or related to any of the accident and

health insurance policies named in the complaint or any policies issued by the respondent since March 1, 1954, as substitutes or modifications for such policies.

2. All contracts, memorandums of agreement, or correspondence between respondent, its officers, agents, employees, or contractors, or any records, books of accounts, or verified summaries thereof which have reference to the following listed advertisements and which show on a state by state basis volume of dissemination of such advertisements by respondent to the general public or to its agents for redissemination to the general public during the years 1953 and 1954.

1. Form letter A & H No. 2.
2. Form letter A & H No. 7.
3. Form letter A & H No. 9.
4. Form letter A & H No. 10.
5. Circular bearing form No. A & H 4800.
6. Postcard bearing form No. A & H 4800-A.
7. Circular bearing form No. A & H 4801.
8. Postcard bearing form No. A & H 4801-A.
9. Circular bearing form No. A & H 4803.
10. Postcard bearing form No. A & H 4803-A.
11. Pamphlet bearing form No. A & H 4804.
12. Pamphlet bearing form No. A & H 4807.

3. One specimen copy of each accident and health insurance policy issued by respondent since March 1, 1954, as a substitute or modification for any of the accident and health insurance policies named in the complaint.

4. Original books, records, or accounts of the respondent, or verified summaries thereof, showing: the dollar volume of the premium receipts received by it from insureds residing in each of the several states of the United States and in the District of Columbia during the years 1953 and 1954 to whom respondent has issued during those years one or more of the following listed policies on a family or group basis; or the total number of such policies issued by respondent during the years 1953 and 1954 in each of the several states of the United States and the District of Columbia:

1. The Basic Equity Accident Policy (No. BA).
2. The Basic Income Equity Accident Policy (No. BAI).
3. The Basic Equity Life and Limb Accident Policy (No. BAL).
4. The Basic Health Policy (No. BHP).
5. The Budget Hospital and Medical Policy (No. GMA).
6. The Hospital Nurses and Expense Policy (No. HNE).
7. Hospital and Medical Policy (No. IMH).
8. Polio Policy (No. PS).

[Endorsed]: Filed October 18, 1955.

[Title of District Court and Cause.]

ANSWER TO APPLICATION FOR AN ORDER REQUIRING THE GIVING OF EVIDENCE AND THE PRODUCTION OF DOCUMENTARY EVIDENCE

The defendant, in answer to the Application filed herein, admits, denies and alleges:

1. Denies that the complaint mentioned in Paragraph One of the Application was issued on March 11, 1955, but alleges that said complaint although dated March 11, 1955, was not issued until March 18, 1955. Admits the remaining allegations of Paragraph One and all the allegations of the remaining paragraphs.

For a Further and Separate Defense the defendant alleges:

That the Federal Trade Commission did not at any time mentioned in said Application and does not now have any jurisdiction to issue the complaint mentioned in the Application nor to maintain the proceedings mentioned in the Application nor over any acts or practices of Fireman's Fund Indemnity Company, the respondent named in said complaint, and therefore no jurisdiction to require testimony or the production of documents by subpoena or otherwise in connection with said complaint or said proceedings and that he respectfully refused to testify or produce documents in said proceeding

for such reasons as is specifically set forth in the Official Record of the Hearing mentioned in Paragraph Three of the Application, a copy of which Official Record is attached hereto and by reference made a part hereof.

Wherefore, the defendant demands that the Application herein for an Order Requiring the Giving of Evidence and the Production of Documentary Evidence be denied and that the defendant be granted such other and further relief as may be proper.

Dated: October 20, 1955.

.....,

CHRISTOPHER M. JENKS,
and
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,

Attorneys for Defendant.

Before the Federal Trade Commission

Docket No. 6310

In the Matter of:

FIREMAN'S FUND INDEMNITY COMPANY.

PROCEEDINGS

October 17, 1955, 1:00 P.M.

Before: J. Earl Cox, Hearing Examiner.

Appearances:

JOHN BROOKFIELD,
Attorney for the Federal Trade Commission.

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE, by
CHRISTOPHER M. JENKS,
Attorney for the Respondent Firemen's Fund Indemnity Company.

EDMUND G. BROWN,
Attorney General of the State of California, by

HAROLD B. HAAS,
Deputy Attorney General of the State of California, Attorneys for F. Britton McConnell, Insurance Commissioner of the State of California, as Amicus Curiae.

Hearing Examiner Cox: Are there any preliminaries before we proceed?

Mr. Haas: I am Harold B. Haas, Deputy Attorney General of the State of California, appearing for the Insurance Commissioner, with a request relative to Section 2.301 of the Rules, to file amicus curiae brief. Copy has been handed to Mr. Cox and to Mr. Brookfield and Mr. Jenks, and the usual original and twenty copies. The rule says that with the permission of the Examiner or of the Commission, the application must be made to the Examiner.

Hearing Examiner Cox: All right, so far as I am concerned, the application will be granted. I am sure the Commission will not object to that.

Anything else?

Mr. Jenks: There is, I think, one more motion undisposed of?

Hearing Examiner Cox: I am certain of what the disposition will be.

Mr. Jenks: Mr. Crafts and Mr. Kemper received their subpoenas in September, and we immediately moved to quash. The motions to quash were denied, although you did grant a portion of the alternative motion to limit.

We appealed that to the Commission, and I received a telegram Friday, that the appeal had been denied. [2*]

However, in the meantime, and on October 10th, Mr. Ellis received a subpoena and on October 11th, I forwarded the Commission, with copies to you and

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to Mr. Sheehy, four copies to him, a motion to quash the subpoena delivered to Mr. Ellis. It is identical with the one to Mr. Kemper on the same jurisdictional grounds which we have been contesting from the inception of this case.

As far as I know, you have not ruled on that motion. It was filed this morning. I got a letter from the Secretary saying it would be placed in appropriate channels.

Hearing Examiner Cox: I have not received a copy of it. We will assume that the same disposition will be made of that and for the same reasons as in the other motion.

I take it, all you have raised is the jurisdictional question?

Mr Jenks: That is right.

Mr. Brookfield: Mr. Examiner, I have Mr. Jenks' motion which I received when I got into town this morning, and I also received a letter to the effect that the prior motion had been denied and a copy of the order denying it.

Mr. Jenks: We have not received a copy of the order yet, Mr. Brookfield. We did receive a telegram on Friday. I assume that presents this question, Mr. Cox. Maybe you are the one to rule on it? Under the Commission's rules, and [3] particularly the last paragraph of Rule 317, it states that we may appeal within ten days to the Commision. We are anxious to preserve our record here and to show that we are doing everything we can to exhaust our administrative remedies.

Therefore, as far as Mr. Ellis is concerned, I will ask that any testimony from him be delayed until we have an opportunity of taking an appeal to the Commission and getting a ruling on it.

Hearing Examiner Cox: Well, I cannot grant that motion because the motion you made with reference to the subpoena, as you stated, practically the same motion made in connection with the other witness, which motion I denied and the denial was sustained by the Federal Trade Commission.

So I would be doing less than my duty if I did not proceed with the hearing, to all of which you may have your exceptions.

Mr. Jenks: As I understand it, from reading the Postal case, which you tried, it is no longer necessary for us to note exceptions, is that correct?

Hearing Examiner Cox: It is never necessary to note exceptions.

Mr. Jenks: I wanted the record to show, however, that we requested the opportunity to appeal in accordance with the Commission's rules.

Hearing Examiner Cox: I want you to feel free to make [4] any objections you have at any time.

Mr. Jenks: Now there is another matter, preliminarily. The subpoena is addressed to Mr. Crafts, and Mr. Crafts and Mr. Kemper were to appear here at 10:00 o'clock in the morning. They were never, either of them, personally officially notified by the Commission of the postponement. Admittedly, I told them about it. Mr. Ellis' subpoena is for 1:00.

Mr. Crafts and Mr. Kemper did appear at 10:00

o'clock. I appeared with them. Naturally the room was as we found it when we arrived here shortly before 1:00, empty and locked.

Now are they considered as still being under subpoena or not?

Hearing Examiner Cox: They are, yes, sir.

Mr. Jenks: They are still under subpoena?

Hearing Examiner Cox: That is right.

Mr. Jenks: Even though they were not officially notified of anything to the contrary?

Hearing Examiner Cox: Well, charge that up to the Hearing Examiner. They should have been but they were not, and they are not excused.

Anything further?

Mr. Jenks: I might ask this: As far as I know, these are the only three subpoenas that have been issued; therefore, the only three about which we have made motions. I notice that in a Postal case, that apparently the company was notified [5] before subpoenas were issued, and actually filed an objection before it was issued.

If there are any other subpoenas which have been issued, I would like to know what they are so that I can make an appropriate motion.

Hearing Examiner Cox: And your answer, then, Mr. Brookfield?

Mr. Brookfield: I found that the subpoena for Mr. Ellis had not been issued when I returned from a previous field trip. As you know, there were two attorneys working on this case: Mr. King and myself. I supposed that Mr. King had issued the subpoena for the ad testificatum subpoena for Mr.

Ellis at the same time that he issued the other two subpoenas. For that reason, the subpoena of Mr. Ellis was not issued at the same time.

At the present time, I might say to Mr. Jenks and to your Honor, there are no outstanding abstaining subpoenas as of this moment.

Mr. Jenks: Thank you.

Mr. Brookfield: Except those three.

Mr. Jenks: Thank you.

Hearing Examiner Cox: There are just one or two things I wanted to straighten up before we go ahead.

I noticed, in looking over the files yesterday, that the order I issued, with reference to one of the subpoenas, refers in the beginning to a subpoena issued on June the 23rd, [6] and the last line, I think, refers to or uses the date of the 28th, which, of course, is a mistake, and refers, of course, to the subpoena issued on the 23rd.

Mr. Jenks: Right.

Hearing Examiner Cox: The other thing, I think, that ought to be clarified: The answer to the Respondent's motion for more definite statement filed by counsel in support of the complaint under date of August 11, 1955, refers to that as being an amendment of Paragraph Six of the Complaint. In fact, I think, that some amendment of Paragraph Five——

Mr. Jenks: I think that is correct.

Hearing Examiner Cox: And it will be so considered.

Mr. Brookfield: What is that, Mr. Examiner—my answer?

Hearing Examiner Cox: Yes, sir.

Mr. Brookfield: The one filed August 11th in answer to Respondent's motion for more definite statement?

Hearing Examiner Cox: Yes. Paragraph Five the paragraph of the Complaint that sets forth the advertising statements that the Respondent is alleged to have issued. The answer sets forth other advertising statements. In my mind, they all should be included as part of Paragraph Five.

Paragraph Six of the Complaint is the allegation in which the meaning of the statements is set forth and there is nothing in the answer of August 11th that modifies that in any [7] way, is that correct?

Mr. Jenks: I think that is correct.

Mr. Brookfield: I might also say that that statement is made in answer to the motion for a more definite statement as to the matters alleged Paragraph Two thereof, referring to the motion made by Mr. Jenks on August 8th.

Hearing Examiner Cox: Well, the Hearing Examiner made mistakes and the counsel made mistakes and now we are all even.

Mr. Jenks: It refers us to Paragraph Six and Paragraph Five, I think.

Hearing Examiner Cox: Just so we understand what the situation is. Now it does not make any difference about the rest of the matters.

You may call your first witness.

Mr. Brookfield: Mr. Examiner, in connection

with Mr. Haas' application that briefs will be filed now or at some subsequent date?

Hearing Examiner Cox: Well, I understand it is to be filed at a later date after the matter comes properly before the Commission, is not that correct?

Mr. Haas: Yes, I believe the time to file would probably be any briefing time that may come up before the Examiner or before the Commission, actually.

Hearing Examiner Cox: You will be notified as to both dates and given the opportunity to file papers, but I understand [8] you have no desire to participate any other way?

Mr. Haas: No, not at the moment; simply to have the appearance entered so that we may file. Thank you.

Mr. Brookfield: Mr. Examiner, subpoena duces tecum was issued against Mr. Crafts to produce the material described in Schedule A, thereof, and I think Mr. Crafts is here. I do not know whether he has produced the material or not. I would like to have Mr. Crafts called and sworn.

JAMES F. CRAFTS

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Brookfield:

Q. You are Mr. James F. Crafts?

A. That is right, sir.

(Testimony of James F. Crafts.)

Q. And you are the President of Fireman's Fund Indemnity Company? A. Yes.

Q. Located at 401 California Street, San Francisco, California? A. Yes, sir.

Q. Mr. Crafts, have you produced material described in Schedule A of the subpoena duces tecum which was issued against you?

Mr. Jenks: Mr. Examiner, at this point I want to make a statement for the record. I will say this first: that insofar [9] as such material is available, I believe it is here partly in my brief case and partly in the brief cases of one of my associates. However, I did want to make this statement for the record.

The regulation of insurance business has belonged historically to the various states, and to the states exclusively. This followed from the Supreme Court decision in the famous old case Paul v. Virginia, 8 Wall. 168 (1868), which held that the business of insurance was not commerce. If it was not commerce it could not be regulated by the Federal government, but only by each of the states.

In 1944 the United States Supreme Court reversed its former holding and in the Southeastern Underwriters case (322 U.S. 533) held that the business of insurance was commerce which might be subject to Federal regulation.

The Congress reacted almost immediately. Public Law 15 (79th Congress), sometimes called the McCarran Act, was passed to restore full regulatory powers to the states. The statute provides that the Federal Trade Commission may regulate the busi-

(Testimony of James F. Crafts.)

ness of insurance to the extent that it is not regulated by state laws. Public Law 15 was held constitutional in Prudential Insurance Company v. Benjamin, 328 U.S. 408 (1946). Admittedly, this case primarily involved taxation rather than regulation, but the United States Supreme Court pointed out: Obviously Congress' purpose was broadly to [10] give support to the existing and the future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it shall be subject to the laws of the several states in these respects.

Public Law 15 has not been tested insofar as it deals with regulation of accident and health insurance or any other type of insurance. However, Senator McCarran himself in discussing jurisdiction said: "The inquiry will be, Is this practice regulated by state law? Not, is it effectively regulated, or is it wisely regulated; but simply is it regulated?"

A similar statement was made by Mr. Sills speaking as counsel supporting the complaints at the joint pre-trial conference in Washington, D. C., in December last year.

(Testimony of James F. Crafts.)

When Public Law 15 was passed the National Association of Insurance Commissioners, in order to preserve state regulation, recommended to the states the adoption of a model act substantially identical with the Federal Trade Commission Act. The model act has been adopted in 37 states. These 37 states have the same power to regulate advertising by state statute [11] as the Federal Trade Commission has by Federal statute. Yet the Federal Trade Commission, without judicial approval or judicial authority, is claiming jurisdiction over the advertising of accident and health insurance in the 37 states which have the model act.

California did not need to adopt the model act. California law, and particularly Section 780 of the Insurance Code, is at least as strong as the model act.

The Federal Trade Commission in this case admits the sufficiency of regulation by California law. It is not in this case claiming any jurisdiction over any advertising used by Fireman's Fund in California.

Fireman's Fund is a California corporation. It derives its authority from California. It is regulated by California, and regulated by California to the extent that the Federal Trade Commission does not claim jurisdiction in California. This California regulation follows Fireman's Fund wherever it does business. Further, Fireman's Fund has complied with the laws of and is licensed to do business in the other 47 states and in the District of Columbia.

(Testimony of James F. Crafts.)

Each of the other 47 states and the District of Columbia may impose additional regulations and additional limitations on Fireman's Fund, but none of them can in any way impair California regulation.

Fireman's Fund has contended from the beginning of [12] this proceeding that the Federal Trade Commission has no jurisdiction over it and no jurisdiction to maintain this proceeding. This has been urged in every manner available to the company. It is still urged. Fireman's Fund believes, as the Secretary of the Commission, Mr. Parrish, has stated, that until the question of jurisdiction is determined there is no valid action which the Commission may take.

Fireman's Fund has asserted and will continue to assert that charges made against it by the Federal Trade Commission are entirely without merit. However, Fireman's Fund believes that regulation of insurance is exclusively a state function and that the Federal Trade Commission has no jurisdiction to maintain this proceeding, nor to require the production of evidence. Therefore we shall resist any attempt to require the company or any of its officers, employees or agents to give evidence or produce documents at this hearing.

If and when the proper courts finally determine that the Federal Trade Commission has any jurisdiction over the advertising of accident and health insurance policies issued by Fireman's Fund, Fireman's Fund will make available to the Commission

(Testimony of James F. Crafts.)

any and all relevant and material facts or documents which the Commission wishes.

There is no judicial remedy available to Fireman's Fund at this stage of the proceeding but there is a simple and immediate remedy available to the Commission. Both the Federal [13] Trade Act and the Administrative Procedure Act provide, in substance, that the proper United States District Court may, on application by the Commission, issue an order enforcing a subpoena. The proper district court in this case is the United States District Court for the Northern District of California.

Fireman's Fund requests, in fact, urges the Commission to take this immediate way of establishing its jurisdiction, if any. We shall gladly cooperate in presenting the various questions fully and fairly to the court for determination. If and when a final order enforcing a subpoena is affirmed on appeal, Fireman's Fund will furnish all relevant and material information or documents. Until then Fireman's Fund respectfully refuses to furnish any information or documents, and each of its officers and employees and agents has been instructed to refuse to testify or produce documents on the grounds, and solely on the grounds, that the Commission has no jurisdiction to maintain this case, no jurisdiction over the respondent, and therefore no jurisdiction to require testimony or the production of documents.

At this point I ask Mr. Crafts to refuse to answer the questions solely on jurisdictional grounds.

(Testimony of James F. Craft's.)

Hearing Examiner Cox: May I have a copy of that statement?

Mr. Jenks: Certainly. [14]

Hearing Examiner Cox: Of course, under circumstances like this, the Hearing Examiner has very little choice. I think in some respects, from the statement that I heard, that the Respondent's position is correct. I think on other grounds and in other respects, it is definitely wrong.

There is not any question in my mind but that the McCarran Act, Public Law 15, was interpreted in the Prudential case. As far as I am concerned, as a Hearing Examiner, I think I am bound by the decision in the Prudential case which, as I understand it, is that the Federal Trade Commission does not have jurisdiction to the extent that it has been exercised by the states.

My study of that decision and my study of the McCarran Act does not lead me to believe that the State of California, which is the domiciliary state of the Respondent, can regulate the activities of the Respondent outside of the State of California and in those states in which there is no regulatory statute. And to that extent, I am positive, in my own thinking, that the Federal Trade Commission has jurisdiction.

In those states in which there is a regulatory statute, whether it follows the model bill that has been mentioned or an equally positive legislative enactment, is, in my mind, regulation within the proviso clause of Public Law 15, but there are states

(Testimony of James F. Crafts.)

that have no such comparable law and transactions between the Respondent company from its home office in [15] California with residents of those states which have no regulatory statute within the meaning of the Public Law 15, constitutes interstate commerce subject to regulation by the Federal Trade Commission.

And I think at least to that extent, the Federal Trade Commission has jurisdiction in this case.

I think also, Mr. Jenks, that the final determination of jurisdiction in these insurance cases will not be in a district court on action in reference to subpoena, but in the circuit court and ultimately in the Supreme Court, following an initial decision in one of these insurance cases.

I happen to have been the Hearing Examiner in what I believe is the first insurance case that has been fully completed. The jurisdictional question was raised. Evidence was presented. Both sides rested; proposed findings of fact and memoranda of law have been submitted. Except for this trip to the West Coast, an initial decision would have been prepared and filed and the question of jurisdiction would have been properly before the Commission and through the Commission on appeal to the courts.

I say that not to suggest that the Respondent should not exercise every right they have and do everything they think necessary to protect their rights, but I do want to indicate that I think the District Court, on a determination of the subpoena

(Testimony of James F. Crafts.)

powers of the Federal Trade Commission, [16] cannot settle the question of Federal Trade Commission jurisdiction over the interstate commerce transactions of the Respondent company.

Mr. Jenks: I would like to point out one thing, Mr. Cox. We believe that we gave you and counsel supporting the Complaint advance notice of this. There was no intention of pulling this as a surprise. I wrote both of you on September 16th, and with copies to Mr. King and Mr. Brookfield.

And then on the same day, the 16th, I answered a letter which I had received from Mr. King, and in both of those letters, the one to you and the one to Mr. King, I stated that for judisdictional reasons, the Respondent will not produce evidence in any form or consent to evidence from any other sources, until compelled to do so. That is still our position.

Hearing Examiner Cox: The only recourse I have, Mr. Jenks, is to order the witness to produce. If he does not produce, then my authority is ended. So I am now ordering the witness to produce.

Mr. Jenks: I think the first thing is that he should answer the question that is pending. I think he should answer that question or refuse to answer it on jurisdictional grounds, and then I think is the proper time for you to order him to produce.

Mr. Brookfield: Mr. Examiner, may I make one statement in answer to one portion of Mr. Jenks' statement, which [17] I think requires explanation in view of the complete statement?

(Testimony of James F. Crafts.)

The attorneys for the Commission, by stating that they did not require the production of information relating to the state of California, did not thereby recognize the authority of the Insurance Commissioner of the state of California but recognized only that in no case, including quack medicines, insurance, monopoly or anything else, does the Commission try to take this authority in intrastate matters of jurisdiction. For that reason only, in my answer, I stated that we were not interested in the transactions or the dissemination of advertising or sales in California, and it was not in recognition of the authority of the California Commission as an Insurance Commission but only in recognition of the fact that the courts have held that the Commission had no jurisdiction in intrastate transactions.

Hearing Examiner Cox: We will proceed with the witness.

Mr. Brookfield: Will you please read the question?

(The reporter read the question as follows: "Question: Mr. Crafts, have you produced material described in Schedule A of the subpoena duces tecum which was issued against you?")

A. I respectfully decline to answer on the grounds that the Federal Trade Commission has no jurisdiction. [18]

(Testimony of James F. Crafts.)

Q. (By Mr. Brookfield): Mr. Crafts, do you also refuse to produce the material on the same grounds? A. Yes, sir.

Mr. Brookfield: Mr. Examiner, I move that the witness be ordered to comply with the subpoena.

Hearing Examiner Cox: Mr. Crafts, I have no choice in the matter. I think the matter is properly subpoenaed and should be produced, so I have no choice in the matter except to order you to produce it and to answer the questions with respect to it.

Mr. Jenks: Same objection and same instructions, Mr. Crafts.

Mr. Brookfield: Mr. Examiner?

Hearing Examiner Cox: Yes, Mr. Brookfield?

Mr. Brooffield: May we be off the record for a question to Mr. Jenks?

Hearing Examiner Cox: Yes, we will be off the record.

(Discussion off the record.)

Hearing Examiner Cox: On the record.

Mr. Jenks: I will state for the record that if Mr. Kemper or Mr. Ellis was placed on the stand, each one would identify himself without any objection from me. On the first question, other than identity, I would make the same objection and instruct them not to answer for jurisdictional grounds [19] and I am convinced they would follow the instructions.

Mr. Brookfield: Mr. Jenks, will you stipulate that these other gentlemen would be bound by any

(Testimony of James F. Crafts.)

court decision that would be applicable to Mr. Crafts?

Mr. Jenks: I will.

Mr. Brookfield: Mr. Examiner, I move that this hearing be continued until Wednesday afternoon at 2:00 o'clock.

Mr. Jenks: I would suggest this: That I believe we have an opportunity to oppose any application, and I think by the time we argue it and present briefs, that it will be more than between now and Wednesday, but if you want to adjourn until Wednesday, that is satisfactory with me.

I think it will be long past Wednesday before we have any decision by our District Court here, which, by the way, is in this same building.

Mr. Brookfield: Well, Mr. Examiner, the reason I suggested this adjournment to a certain definite date was, I think, under the procedure in preparing my petition to the District Court, that I have to request the District Court to require the witness to appear at a certain date.

Now I do not know how the District Court acts here. I know in the only other case I had, why it was a matter of about two and a half hours before we got the order.

Mr. Jenks: Well, I might say this, Mr. Brookfield, I do not care whether you get the order in one hour or two and [20] a half, let us not misunderstand each other. We will immediately appeal to the Circuit Court and ask that the order be suspended pending the appeal.

(Testimony of James F. Crafts.)

Hearing Examiner Cox: Well, I am not going to enter into a discussion as to when the Court may act. That is up to the Court itself. I think we ought to know very shortly what the attitude of the Court is and how long a protective action will take.

So instead of setting it over until Wednesday afternoon, I am going to set it over to Wednesday morning, 11:00 o'clock, at which time I shall expect some information from counsel as to what the progress of the proceeding is and we will make a more definite determination at that time.

So we will now adjourn to reconvene at this same place Wednesday morning at 11:00 o'clock.

Mr. Brookfield: May I ask for the purposes of this record, that the record show that these witnesses have not been discharged?

Hearing Examiner Cox: I do not think it can show that any more than it already does. I stated at the beginning that the witnesses had not been discharged. They are still under subpoena.

Mr. Jenks: Right.

Hearing Examiner Cox: And Mr. Crafts is under orders to produce and to testify. I think that is clear in the record. [21]

So we will now adjourn to reconvene at this same place Wednesday morning at 11:00 o'clock.

(Whereupon, at 2:15 p.m., October 17, 1955, the hearing in the above-entitled matter was adjourned.)

[Endorsed]: Filed October 20, 1955. [22]

In the District Court of the United States for the Northern District of California, Southern Division.

No. 34,986

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

JAMES F. CRAFTS,

Defendant.

ORDER REQUIRING THE GIVING OF EVIDENCE AND THE PRODUCTION OF DOCUMENTARY EVIDENCE

The Federal Trade Commission, having invoked the aid of this Court in requiring the attendance and testimony of James F. Crafts and the production of documentary evidence by James F. Crafts, as a witness in a proceeding instituted by the Federal Trade Commission against Fireman's Fund Indemnity Company (D. 6310), and

The Court having considered the application, it is hereby

Ordered: That the application be, and the same hereby is granted, and that the said James F. Crafts be, and he is, hereby ordered to appear upon not less than ten days' notice at a time and place to be set by the Federal Trade Commission or a Hearing Examiner thereof designated by the said Commission to take testimony and receive evidence,

and to perform all other duties authorized by law in the prosecution of the inquiry pending before said Commission entitled, "In the Matter of Fireman's Fund Indemnity Company, a corporation, Docket No. 6310," or an examiner subsequent hereto designated by it for such purposes, to give evidence and testimony at the aforesaid time and place touching matters brought in question by the complaint of the Federal Trade Commission against Fireman's Fund Indemnity Company, a corporation, and the answer thereto, to then and there produce the documentary evidence identified and described in a subpoena issued by the said Commission, on September 22, 1955, and already served upon said James F. Crafts, and which the said James F. Crafts has not produced, and to answer at said time and place every question relevant and material to said proceeding and necessary and proper to the conduct thereof and to attend before said Examiner of the Federal Trade Commission from day to day until his examination shall have been completed.

It Is Further Ordered: That this Order and its effectiveness be and the same is hereby stayed for the time permitted by law for an appeal therefrom, and if such appeal is filed, thereafter until final determination of such appeal.

Dated: October 21, 1955.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

James F. Crafts, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in this proceeding on October 25, 1955, requiring him to appear, testify and produce certain documents at a Federal Trade Commission meeting.

Dated: November 18, 1955.

/s/ CHRISTOPHER M. JENKS,
CHRISTOPHER M. JENKS, and
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Defendant.

[Endorsed]: Filed November 18, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, James F. Crafts, Defendant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit from an Order entered herein on October 25th, 1955, in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Petitioner in said action; and

Whereas, the said Defendant is required to give an Undertaking for costs on appeal as hereinafter conditioned:

Now, Therefore, Fireman's Fund Indemnity Company of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said Defendant and acknowledges itself bound to the said Petitioner in the sum of Two Hundred Fifty and No/100 Dollars ($250.00) that the said Defendant will pay all costs which may be adjudged against him on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and No/100 Dollars.

It Is Further Stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above-entitled District Court may, upon notice to the Surety of not less that ten (10) days, proceed summarily in said proceedings to ascertain the amount which the said Surety is bound to pay on account of such breach and render judgment therefor against the said Surety and award execution thereof.

Signed, Sealed and Dated this 18th day of November, 1955.

[Seal] FIREMAN'S FUND
INDEMNITY COMPANY.

By /s/ F. J. BUTCHER,
Attorney in Fact.

State of California,
City and County of San Francisco—ss.

On this 18th day of November, 1955, before me, Mercedes Miller, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. J. Butcher, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company, and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ MERCEDES MILLER.
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires January 22, 1959.

[Endorsed]: Filed November 18, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 34986

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

JAMES F. CRAFTS,

Defendant.

REPORTER'S TRANSCRIPT

Friday, October 21, 1955

Before: Hon. Oliver D. Hamlin.

APPLICATION FOR AN ORDER REQUIRING GIVING OF EVIDENCE, ETC.

Appearances:

For the Plaintiff:

JOHN W. BROOKFIELD, ESQ.

For the Defendant:

CHRISTOPHER M. JENKS, ESQ.

The Clerk: Federal Trade Commission v. Crafts. Application for Order.

Mr. Brookfield: Ready.

Mr. Jenks: Ready, your Honor.

Before we start, your Honor, Mr. Brookfield and I have agreed that the Company's Answer to the Federal Trade Commission's complaint can go in as

an exhibit on behalf of Mr. Crafts, for two purposes. Primarily, the complaint alleges that we are a California corporation; we admit it. The complaint alleges in paragraph 3 that we are qualified and licensed to do business in the 48 states and the District of Columbia, and that is admitted in paragraph 3 of the answer.

The Court: The complaint is in the file?

Mr. Jenks: The complaint is already attached to the application.

The Court: You are offering it in evidence?

Mr. Jenks: Yes, your Honor.

(Thereupon Answer to Complaint of Federal Trade Commission in the Matter of Fireman's Fund Indemnity Company, a corporation, Docket 6310, was received in evidence and marked Defendant's Exhibit A.)

DEFENDANT'S EXHIBIT A

United States of America
Before Federal Trade Commission

Docket No. 6310

In the Matter of

FIREMAN'S FUND INDEMNITY COMPANY,
a Corporation.

ANSWER

Fireman's Fund Indemnity Company, respondent in the above-entitled proceeding, in answer to the

Defendant's Exhibit A—(Continued)

complaint issued herein on March 18, 1955, under date of March 11, 1955, admits, denies and alleges as follows, reserving, however, any and all objections which it has ever had, now has or may hereafter have to the form or sufficiency of the complaint and to the jurisdiction of the Federal Trade Commission to institute or maintain this proceeding or any part thereof:

Alleges that it is without knowledge of what reason or reasons, if any, the Commission had to believe that respondent has violated the provisions of the Federal Trade Commission Act or the reason or reasons, if any, why it appeared to the Commission that a proceeding by the Commission against respondent would be in the public interest, and denies that respondent at any time violated any provisions of said act or that this proceeding ever has been or is now in the public interest.

Paragraph One. Admits that respondent is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 401 California Street, San Francisco, California, not 410 California Street as alleged in Paragraph One of the complaint.

Paragraph Two. Admits that respondent was as of the date of the complaint and for more than two years preceding the date of the complaint and is now engaged as an insurer in the business of insurance in various states of the United States, but denies

Defendant's Exhibit A—(Continued)

that respondent has entered into insurance contracts with insureds located in any states of the United States in which the business of insurance is not regulated by state law or is not regulated by state law to the extent of regulating the practices alleged in the complaint or that the Commission has or at any time mentioned in the complaint had jurisdiction over any act or practice of respondent in any state of the United States or in the District of Columbia. Denies that any practice alleged in the complaint was at any time mentioned therein or is now illegal or did or could constitute a violation of the Federal Trade Commission Act. Denies that respondent as of the date of the complaint or at any time mentioned in the complaint maintained a substantial course of trade in accident and health insurance policies in commerce between, among or in the several states of the United States or any of them.

Denies that any of the policy forms listed as Numbers 1 through 7 in Paragraph Two of the complaint was sold at any time mentioned in the complaint in the states of Massachusetts or Arkansas. Alleges that said policy forms had been adopted several years prior to any date mentioned in the complaint pursuant to the so-called Standard Provisions Law then in effect in most of the states in the United States and that said policy forms were and each of them was thereafter revised pursuant to the so-called Uniform Policy Provisions Law and that

Defendant's Exhibit A—(Continued)

said policy forms listed in the complaint were discontinued in each state as and when said state permitted policies to be issued pursuant to said Uniform Policy Provisions Law. Denies that said policy forms were and any of them was used in the state of West Virginia after July, 1955, in the states of Minnesota and Oklahoma after October, 1954, in the state of Georgia after September, 1954, or in any other state except the state of Missouri after March, 1954, and alleges that said forms will be discontinued in the state of Missouri as soon as the laws or regulations thereof permit the use of the policy forms now being used in the other states.

Denies that the polio policy form listed as No. 8 in Paragraph Two of the complaint was ever issued or sold by respondent in the State of Arkansas. Denies that said polio policy form was used in the State of West Virginia after July, 1955, in the State of Georgia after September, 1954, in the States of Florida and South Carolina after November, 1953, or in any other state except the States of Maryland and Missouri after June, 1953, and alleges that said form will be discontinued in the States of Missouri and Maryland as soon as the laws or regulations of said states, respectively, permit the use of polio policy form now being used in the other states.

Paragraph Three. Admits that respondent has qualified to do business in and is licensed as provided by the respective state laws to engage in the business of insurance in all of the forty-eight states

Defendant's Exhibit A—(Continued)

of the United States and the District of Columbia and alleges that at all times mentioned in the complaint respondent did and does now comply with the laws of such states, respectively; that its business is regulated in each of the said states and the District of Columbia; and that the Federal Trade Commission does not now and never has had any jurisdiction over any part of such business as conducted by respondent between, among or in any of said states or the District of Columbia or at all.

Paragraph Four. Denies that respondent in the course or conduct of its accident and health insurance business or at all during the two years prior to the date of the complaint or at any time disseminated or caused to be disseminated in the form of printed or written matter, or at all, any false or misleading or deceptive advertising or other statements concerning any of the terms or provisions of any of the forms of policies specified in Paragraph Two of the complaint. Denies that such or any statements were disseminated by letters, bulletins, circulars, etc. or at all, through the United States mail or by any other means or through its agents in commerce or at all between, among or in the various states of the United States or any of them. Denies that the purpose or effect of the statements mentioned in Paragraph Four of the complaint or any of them was as of the date of the complaint or at any time mentioned therein to induce members of the public or any of them to become insured by the

Defendant's Exhibit A—(Continued)

respondent under the terms and provisions of any of the forms of policies listed in Paragraph Two of the complaint. In this connection, respondent denies that at any time mentioned in the complaint it furnished or otherwise disseminated advertising material to anyone except to some independent agents and to some independent brokers located in some but not all states, each of whom was at said time separately licensed to do business as an independent agent or independent broker in the state and separately regulated by the state in which said independent agent or said independent broker was located and alleges that it is without knowledge as to what use, if any, said independent agents or said independent brokers or any of them made of said advertising material and basing its denial on that ground denies that said independent agents or said independent brokers or any of them disseminated any of said advertising material to any member of the public.

Paragraph Five: Admits that the statements quoted in Paragraph Five of the complaint were contained in one or more pieces of advertising material prepared by respondent in connection with the forms of policies listed in Paragraph Two of the complaint and furnished to some independent agents and independent brokers in connection therewith as set forth in Paragraph Four of this answer but denies that said statements or any of them were contained in any other advertising material dis-

Defendant's Exhibit A—(Continued)

seminated or otherwise issued to anyone by respondent.

Alleges that the Commission in quoting certain statements in Paragraph Five of the complaint and counsel supporting the complaint in quoting certain statements in their answer to respondent's motion for a more definite statement have taken said statements from advertising material issued by respondent in connection with some but not all of the forms of policies listed in Paragraph Two of the complaint; that none of said advertising material applied or was intended to apply to all of said forms of policy; that none of said statements is the complete text of any advertising material issued by respondent; that the Commission and counsel supporting the complaint have lifted said statements and each of them out of the complete text of the advertising material in which said statements appeared respectively and that by lifting said statements out of context the Commission and counsel supporting the complaint have attempted to imply to such statements and each of them meanings, inferences, and innuendoes contrary to the true meaning of such statements when read in connection with the entire text in which said statements appeared respectively and have attempted to imply contrary to the true facts that said statements or some of them standing alone induced some member of the public to purchase insurance on one or more of said forms of policies and denies that said statements or

Defendant's Exhibit A—(Continued)

any of them or the advertising material from which said statements were taken or any of it induced a substantial or any portion of or any member of the public to purchase any insurance on any of the forms of policies listed in Paragraph Two of the complaint.

Paragraph Six. Denies that through the use of the statements set forth in Paragraph Five of the complaint or the statements set forth in the answer filed by counsel supporting the complaint to respondent's motion for a more definite statement or others of similar import or meaning not specifically set out in the complaint or at all, respondent represented at any time mentioned in the complaint directly or by implication with respect to any of the forms of policies listed in Paragraph Two of the complaint that such forms of policies or any of them provided the indemnification against loss or other indemnification specified in any allegation in Paragraph Six of the complaint.

Paragraph Seven. Denies that any of the statements or representations to which reference is made in Paragraph Seven of the complaint was false, misleading or deceptive. Denies that any statement or representation made by respondent in connection with any of the policies listed in Paragraph Two of the complaint was at any time false, misleading or deceptive or contrary to the terms and conditions of said policies. Admits that some of the conditions or exclusions specified in Paragraph Seven were con-

Defendant's Exhibit A—(Continued)

tained in some of the forms of policies listed in Paragraph Two of the complaint but denies that each of said conditions or exclusions was contained in each of said policies and denies that any advertising material issued by respondent at any time mentioned in the complaint in connection with any of the forms of policies listed in Paragraph Two of the complaint was contrary to the provisions or any of them of the form of policy to which such advertising material was applicable or was contrary to the laws, regulations or general usages of trade applicable thereto.

Paragraph Eight. Denies that respondent used any false or misleading statements or representations with respect to any of the terms or conditions of the policies listed in Paragraph Two of the complaint or any of them. Denies that respondent failed to reveal the limitation or limitations of coverage found in said forms of policies or any of them or that any statement or representation of respondent in connection with said forms of policies or any of them ever had the tendency or capacity to mislead or deceive or ever did mislead or deceive a substantial or any portion of or any member of the purchasing public into any erroneous or mistaken belief regarding any statements or representations made by respondent concerning said forms of policies or any of them. Denies that respondent at any time mentioned in the complaint made any statement to induce said or any portion of or any member of the

Defendant's Exhibit A—(Continued)

purchasing public to purchase insurance coverage from respondent because of any erroneous or mistaken belief.

In this connection respondent alleges that it did not at any time mentioned in the complaint sell or offer to sell accident and health insurance by mail, radio, television, newspapers, magazines or other advertising media or at all directly to any member of the public but at all times mentioned in the complaint did sell and offer to sell such insurance only through various independent agents and independent brokers each of whom is separately licensed to do business and separately regulated by the state in which said independent agent or said independent broker is located.

Respondent is informed and believes and upon such information and belief alleges that no person was at any time mentioned in the complaint misled by any advertising material issued by respondent during said period in connection with the forms of policies listed in Paragraph Two of the complaint or any of them, or used during said period by any of said independent agents or said independent brokers in connection with said forms of policies or any of them.

Denies that any action or practice of the respondent set forth in the complaint was in any respect or at all to the prejudice or injury of the public or any member thereof, or constituted or constitutes unfair

Defendant's Exhibit A—(Continued)

or deceptive acts or practices in commerce within the intent or meaning of the Federal Trade Commission Act or at all.

Wherefore, respondent demands that the complaint herein and this proceeding be dismissed.

Dated: August 31, 1955.

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,

By CHRISTOPHER M. JENKS,
Counsel for Respondent.

Received in evidence October 21, 1955.

Mr. Brookfield: Is there any limit on the time?

The Court: Well, I don't want to put a limit on you gentlemen. I am going to ask counsel some questions to start [3*] with that may shorten up the matter. Since yesterday I have had an opportunity to read the statement that was made by the Fireman's Fund before the Commission and have had a chance to look at some authorities. I haven't had, of course, an opportunity to thoroughly go into it, but I have seen some cases that seem to me to require me to ask these questions.

Mr. Jenks, are you familiar with the Endicott-Johnson case?

Mr. Jenks: We are.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: The Tobin case?

Mr. Jenks: We are.

The Court: And the cases that are cited after that?

Mr. Jenks: Right, sir.

The Court: How do you distinguish those cases?

Mr. Jenks: They, particularly the Tobin case, involve a subpoena issued in an investigative matter where the facts were needed to determine if the company was operating in interstate commerce.

As we interpret Public Law 15 of the 79th Congress, which is the statute involved here, it is an entirely different situation. In the first place, this is an adjudicative proceeding on issues framed by the complaint and it is our position——

The Court: In all those cases, the question was raised [4] as to whether the particular body involved had jurisdiction in the matter, and in all of those cases it said that it was not the function of the District Court to go into the question of coverage.

Mr. Jenks: Not the function where it was an investigative subpoena and the facts which the Commission was seeking were the facts upon which jurisdiction would depend.

I might say to your Honor that one of the reasons we are here is because of the footnotes in the Tobin case, which referred to the legislative history of the Administrative Procedure Act.

Now, that legislative history as set forth in the legislative history of the Administrative Procedure Act in official publication of the United States Gov-

ernment Printing Office, says, speaking of Section 6-C of the Administrative Procedure Act, which is the section, in addition to Section 9 of the Federal Trade Commission—provides that the Court: "when a party contests a subpoena the court is to inquire into the situation and, so far as the subpoena is found in accordance with law, issue an order requiring the production of the evidence within a reasonable time under penalty of contempt for failure then to comply."

Now, the statement made by the House Committee, House Judiciary Committee, in connection with the conference report, says this: [5]

"This provision will assure private parties the same access to subpoenas pursuant to the same just and reasonable routine as that available to the representatives of agencies. It will also prevent the issuance of improper subpoenas or action by an agency requiring a detailed, unnecessary and burdensome showing as to what evidence is sought. The section constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction in connection with any agency function or authority. It does not mean that upon contest the court should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance. They should instead (they, the courts) inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction.

"This section expressly recognizes the rights of

parties subject to administrative subpoenas to test their validity in courts prior to subjection to any form of penalty for non-compliance. In such contests, the court is required to determine all relevant questions."

The Court: You are reading from the statement of the legislative history? [6]

Mr. Jenks: That's right. I think part of that is quoted in the Tobin case.

The Court: In the Tobin case itself, after saying there is some contrariety of opinion as to that, it reaches that problem and decides against it."

Mr. Jenks: It decides against it as to an investigative subpoena where the facts sought by the subpoena are the facts upon which agency jurisdiction will depend.

We don't have that here.

Public Law 15, if you consider its legislative history, is a rather unique situation, as far as I know—possibly actually unique in federal statutes. From 1868, in Paul v. Virginia, until 1944, in U. S. v. Southeastern Underwriters, the federal government had no jurisdiction to regulate insurance because Paul v. Virginia had decided that the business of insurance was not commerce.

That was reversed in 1944, in U. S. v. Southeastern Underwriters.

Congress reacted almost immediately. They had a series of hearings and they finally passed Public Law 15, for the obvious purpose, in our opinion, of restoring to the states their power to regulate. Or,

to put it this way, it has been suggested by some of the hearing examiners in the Federal Trade Commission who passed on motions to dismiss, that no state has the power to regulate transactions [7] in another state or to regulate interstate commerce. So I think the correct way to look at Public Law 15 is that it gave power to the states; it was letting them use what they used before by taking away from the Federal Trade Commission power to regulate any transaction which was regulated by state law.

The Court: Suppose it wasn't regulated by state law?

Mr. Jenks: I think they have possible authority. No, the actual situation——

The Court: You mean the Federal Trade Commission?

Mr. Jenks: Right.

The Court: That is something that is going to be determined in your proceeding.

Mr. Jenks: Not the first point we are going to urge before your Honor, and it may be that we are here because of a difference between California law and the laws of the other 47 states; I haven't read them all.

I might say this, that immediately after passage of Public Law 15, the National Association of Insurance Commissioners drafted a model act recommend its adoption in the various states. My information is that it is now adopted in 37 states; I think Mr. Brookfield feels it has been adopted in 30 or 31. We can straighten that out later. Anyhow, several states have adopted it.

In a Michigan case before a hearing examiner, the [8] Michigan company raised by motion to dismiss the questions we are raising here. The examiner in denying that pointed out that the Michigan statute referred to transactions in the state. Now, California statute does not. We contend that because of the California law, and particularly Section 780 of the Insurance Code, that all advertising by Fireman's Fund anywhere it goes is regulated by state law, by the law of California, and therefore under Public Law 15 as a matter of law (not as a question of fact)—as a matter of law, the Federal Trade Commission could have no jurisdiction over us. That will be our first and main argument.

Our next argument, if your Honor does not go along on that, will be a suggestion that if you do issue an order enforcing the subpoena here, that you limit the testimony or documents to be produced to those acts or practices in states which have not passed state laws. But our main argument is that the Federal Trade Commission cannot, as a matter of law have any jurisdiction over the advertising practices of Fireman's Fund because of Section 780 of the Insurance Code and its complementary enforcement section, 783.5, which authorizes the Commissioner to suspend the certificate of authority of a company that violates Section 780.

The Court: Did you happen to read an article that just came out this week in the Insurance Counsel Journal?

Mr. Jenks: I did not. [9]

The Court: Well, it came to my desk a couple of

days ago, before this matter came up. There is an article in there on Federal Trade Commission jurisdiction by Mr. Frazier who is General Counsel—I don't know who he is—he is reported here as General Counsel of Health and Accident Underwriters Conference. In that article, without reaching any conclusion, it purports to set forth the various contentions that have been made in the cases, in Paul v. Virginia and the following cases. I just happen to have read that. It throws some light on the subject.

Mr. Jenks: A similar question was explored and discussed by Mr. Knowlton, who is one of the insurance commissioners—I think it is Vermont—one of the New England states. He spoke on the subject before the American Bar Association convention in Philadelphia this year, and he himself presented the question that if a corporation is regulated by the laws of its domiciliary state, then the Federal Trade Commission has no authority over anybody.

The Court: May I ask this question: Do you have any cases which overrule the Endicott-Johnson case, the Tobin case—the Tobin case is cited in two other cases, each of which affirm the Tobin theory—do you have any cases that overrule those?

Mr. Jenks: No. I will tell you this: As far as I know, the question in connection with a subpoena issued in [10] a judicative proceeding as opposed to an investigatory proceeding, has not come before any court since the passage of the Administrative Procedure Act. However, prior to that time and under

an identical statute, identical as Section 9 of the Federal Trade Act, the United States Supreme Court, in Jones v. Securities and Exchange Commission, reversed a District Court which had issued an order to compel obedience to a subpoena, reversed it on the ground the Securities and Exchange Commission had no authority to maintain the proceeding and therefore there was no authority to issue the subpoena, and the United States Supreme Court, in Jones v. Securities and Exchange Commission, 298 U. S. 1, reversed the District Court. The facts there were this: Mr. Jones——

The Court: That was prior to the Endicott-Johnson case?

Mr. Jenks: Yes. But, as far as I know, the Endicott case doesn't attempt to overrule it. Here is the distinction I am trying to make, your Honor, that if the facts sought by the subpoena, for instance, whether you are engaged in interstate commerce, whether you have fifty employees, whether you have been paying proper overtime, if those facts upon which jurisdiction depends are the very facts sought by the subpoena, the Court should enforce it without looking at the question of jurisdiction.

The Court: Isn't that exactly the situation that you [11] have here?

Mr. Jenks: No.

The Court: Your own answer that you filed here is an answer denying the jurisdiction of the Commission.

Mr. Jenks: Yes, but we are doing it purely as a question of law.

We will again turn to the legislative history of the Administrative Procedure Act. I am going to read again one section:

> "They, the courts, should instead inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction."

Now, in our opinion, the Federal Trade Commission cannot lawfully have any jurisdiction over Fireman's Fund anywhere because of California statute. Now, that is our main position.

The Court: That is something that is to be determined in that proceeding, it would seem to me. Whatever factual situation develops there or legal situation, you will then have an opportunity to have that determined if the Federal Trade Commission makes an adverse order to you.

Mr. Jenks: No question about that.

The Court: But at the moment I can't see how this District Court can overrule the Circuit Court in the cases [12] that have been cited, unless you have some authority that will permit this Court to do it.

Mr. Jenks: Well, if your Honor feels that way, there is nothing I can do except go to our own Circuit Court.

The Court: I want to tell you right at the outset that's how I feel.

Mr. Jenks: I feel, and we have read and studied

these cases, that there is a distinction between a subpoena which is seeking to elicit the facts upon which jurisdiction depends and a situation where, as here, we are claiming as a matter of law, the Commission can have no jurisdiction. The facts that they elicit here will not determine their jurisdiction, under our theory. Those facts cannot determine the existence of a California statute. That is a matter of judicial notice and we are claiming, because of the very existence of that California statute, the Federal Trade Commission as a matter of law and of law alone, has no jurisdiction.

I might point out that somewhat similar situations, not directly subpoena cases, have come up in the Supreme Court and have come up since the passage of the Administrative Procedure Act. In the Federal Power case v. The Panhandle Eastern Pipeline, 337 U. S. 498, the Federal Power Commission sought an injunction to prevent a transfer of gas property in completion of a sale until such time as it [13] could investigate whether the public interest required the Panhandle Eastern to retain the property as gas reserves. In other words, the Power Commission didn't want the property transferred until it could make its investigation. The Supreme Court held that the Federal Power Commission had no authority to control the sale of such property and affirmed a denial of the order, in other words, refused to permit the injunction so that the Federal Power Commision could conduct its investigation.

The Supreme Court said:

"The Commission argues that at any rate the transfer should be enjoined until it can determine its own power and the necessity of using it. To be entitled to judicial assistance, however, the order issued by the Commission must be valid and based upon a statutory grant of power to the Commission."

Now, we are saying here that when Congress adopted Public Law 15 and took away from the Federal Trade Commission the right to regulate the business of insurance to the extent it was regulated by state law, it took away from the Federal Trade Commission the power or authority of any kind over Fireman's Fund because of California law. The California Insurance Code is certainly a state law. Section 780 provides in substance that a California insurance [14] company shall not make any misrepresentations regarding the terms of a policy, the benefits of a policy, or dividends which might accrue under it. Section 783.5 gives the Insurance Commissioner the power to suspend the certificate of authority of a California company (not a foreign company doing business; I am not talking about that; I am talking about a California company) if it does make such misrepresentations. And I know that the Attorney General, if permitted to file a brief here, will urge upon you that Section 780 is a limitation on a California corporation, no matter where it goes.

In fact, I can inform you that there is now pending a very similar question of law in the Superior

Court in the State of California. The facts of that case, Foster v. McConnell: Mr. Foster, a licensed insurance agent in California, was charged with making misrepresentations to soldiers at Fort Ord. Fort Ord is a federal reservation, one of those where California has ceded full sovereignty. The Commission revoked this agent's license for making misrepresentations on the reservation. The agent, Mr. Foster, has pending in the Superior Court of San Francisco a writ of mandate to compel restoration of his license on the ground that California has no jurisdiction over him outside of the state and at which Fort Ord is. The Insurance Commission, through the Attorney General, is resisting, and I have read [15] the briefs already on file there. They call attention to the fact that the "Bar cases," members of the bar—there are many cases in this country—where a member of the bar has been suspended or disbarred by his own state for acts outside of the state.

The same thing is true, I think, in the corporate securities cases. I don't think anyone would say that the California corporate securities law does not apply to California corporations everywhere. Sure, a foreign corporation can issue securities in any state of the union without a permit in California, unless they want to sell in California, but a California corporation cannot issue any securities anywhere without a certificate from the California Corporation Commission and cannot sell securities anywhere except in accordance with conditions laid down by our California Commission.

The California law as it affects domestic companies and imposes limitations on them follows them everywhere. Admittedly, some other state can impose additional limitation, but no state in the union can take away from a corporation the limitation which its own state has imposed on it.

Our argument is, our point, that because of Section 780, which will follow a California insurance company everywhere, Congress has taken away from the Federal Trade Commission any authority to regulate a California insurance [16] company, and Fireman's Fund Indemnity Company is such a company, and therefore under the Administrative Procedure Act, which enjoins you to look at this in accordance with law, and the administrative history which says that you should look at jurisdiction to determine at least if the agency could have jurisdiction, we believe are properly before you, and that the Endicott case does not apply because it is an investigative proceeding as opposed to adjudicative, and I don't think that either Mr. Brookfield or I have found any cases since the Administrative Procedure Act that apply to a judicative proceeding.

The Court: I will hear from you, Mr. Brookfield.

Mr. Brookfield: The principal question involved here, in my opinion, is whether or not there is anything in the Administrative Procedure Act which would change the provision of Section 9 of the Federal Trade Commission Act that would provide for the issuance—for the enforcement of this subpoena.

I am unable to find anything. The Tobin case discussed it, and discussed it in my favor, I think.

Another issue raised by Mr. Jenks was the question of a judicative proceeding. I can see no difference between the issue of the subpoena before or after. In fact, I would think it would be more pertinent to issue after the Commission has by its investigation determined and complied with the Section 5 of the Federal Trade Commission to determine that [17] it has jurisdiction. These complaints are issued as shown by the complaint itself after the Commission has determined by investigation or otherwise that there is apparent reason for issuing the complaint.

Now, this very District Court in National Labor Relations Board against Hamilton, issued a subpoena in a judicative case. That case unfortunately is not reported in the Federal Reports, but is reported in 24 L.R.M. at 2525 and Judge Lemmon issued a subpoena under circumstances similar to this and the Circuit Court in 177 Fed. 2d upheld it.

As to whether or not the California law would prevent the Commission from at least issuing its complaint and trying its case, I, of course, disagree entirely. I have argued this matter before examiners but not before court, because we had the identical question come up in Michigan. The only difference between the two was that the Michigan statute said, "in this state." The California statute does not say, "in this state," but certainly under the law that the state has no authority outside of the state, those words must be read into it by judicial inter-

pretation because I think it is certainly true that no state has any jurisdiction outside of itself to enforce its penal or other statutes. There is no doubt about the Section 15, that it was passed to restore to the—Public Law 15, I should have said—was passed to restore to the states their taxing and forfeiture power with [18] regard to insurance.

The debate on Section 15, on the McCarran Act—if I may just read a short portion of it, with your Honor's permission.

> "Mr. O'Mahoney: Mr. President, there is not a line or sentence in the proposed Act as I have read it, which would delegate to any state the power to legislate in the field of interstate and foreign commerce. State regulation must be for the state and not for the United States. The bill does not sacrifice the power of the Congress to regulate in the field of interstate commerce. Nothing in the proposed law would authorize a state to try to regulate for other states or authorize any private group or association to regulate in the field of interstate commerce.
>
> "Mr. Ferguson: If the Senator's (Pepper's) statement was that the proposed Act would permit a state to regulate interstate commerce—insurance in interstate commerce—in the various states, the state could not do it.
>
> "Mr. Pepper: No one is claiming that."

I refer to the 91 Congressional Record 1483.

I would like to read this quotation of the House Report: [19]

> "It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case."

That is from the report.

I respectfully submit that the weight of authorities is that this subpoena should be enforced and I respectfully request that you do so. I shall be glad to answer any other questions or argue at great length.

The Court: Well, I am inclined to agree that the Supreme Court in the Endicott case and the Circuit Court of the Fifth Circuit in the Tobin case, and the two other cases that have been cited after that, one of which was a Federal Supplement case which discussed it rather in detail—I think the Kilgore case—all have stated that this court should not go into the matter of coverage, that the matter of the issuance of subpoena is provided for by Public Law 15, and in the case of a disobedience to it they may come to the District Court and ask for the enforcement of that subpoena. I don't see how this Court can, in the absence of any authority presented to me, can go counter to the decisions that I have mentioned.

Mr. Jenks: If your Honor please, if you take that position, it seems to me that you are reading out of the Administrative [20] Procedure Act the words, "The court is to inquire into the situation and so far as the subpoena is found in accordance with law, issue the order."

Now——

The Court: That language, "In accordance with law," was discussed in the Tobin case, wasn't it?

Mr. Jenks: That's right. It was in the footnote. And again there we had the situation, as I said before, where the facts which the Commission was attempting—or the agency was attempting to elucidate—were the facts upon which jurisdiction would depend. We don't have that here. We are presenting a clear question of law. That's all.

I might refer to another part of the legislative history——

The Court: Let me interrupt you, Mr. Jenks.

Mr. Jenks: Yes.

The Court: In that matter legislative history, where one person gets up and makes one statement of one kind and another, another, is purely conversation of those people at the time the law is passed, and the law then goes into effect. That is covered in the Tobin case: "In accordance with law":

> "Upon consideration, this provision was omitted and the term 'in accordance with law' was inserted. We cannot assume that this deliberate substitution of language in view of the existing [21] law, was not intended to define

with exactness the limits of inquiry in judicial enforcement proceedings. The reports of both the Senate and the House Judiciary Committee sustain this view."

Then they go on to say also there was some contrariety of opinion as to the House report at the time. But the Court says:

"We are not impressed by these expressions."

And they meet the issues squarely and determine it adversely, I believe, to your contention.

Mr. Jenks: Well, I disagree with you, but I think there is a great distinction between the cases and I want to point this out. I don't think the official report of the House Judiciary Committee on the Conference is merely idle conversation. After the Administrative Procedure Bill had passed both Houses, with differing provisions, and had been subject to the conference procedure, the Judiciary Committee comes back to the House with the conference report, and what I read to you was that conference report, which is, I think, recognized as a reason why Congress acted because its conference men in each House reported certain things.

Now, to step away from the Administrative Procedure Act for a moment. I don't think the Administrative Procedure Act as such is necessary in this case at all. I don't think we even have to look at it. The Administrative Procedure Act, [22] in Section 6, I think this is the fact, was adopted primarily to implement federal statutes different from Section 9

of the Federal Trade Commission. The Federal Trade Commission statute already provided that the Commission could come to court to enforce its subpoena. The identical provision is in the Securities and Exchange Act, the reason for it being that the Securities and Exchange Act of 1933 was first given to the Federal Trade Commission to administer. The Securities and Exchange Commission was not created until 1934. The provisions in both Acts are identical. The Administrative Procedure Act adds nothing to them and takes nothing away from them, and yet the United States Supreme Court in construing the identical provisions of the Securities and Exchange Act reversed the lower court which had issued the order. It reversed it because the Commission was acting without authority and that is what we are saying here. The Federal Trade Commission is acting without authority, and I have yet to see any case which holds that where an administrative agency is acting without authority, the Court should issue the subpoena so it can decide if it has its own authority, if as a matter of law there is no authority. And that is the thing we are claiming, that as a matter of law there is no authority, completely different from the Tobin case, I think.

The Court: Well, I just don't follow you, Mr. Jenks. [23] I can't go along with that.

Mr. Jenks: May I look at the Tobin case again for a moment? (Counsel referring to Tobin v. Banks and Rumbaugh, 201 Fed. Reporter, 2d Series, 223.)

The Court: Let me read this language to you, on page 226 of the Tobin case:

"There is nothing in the Administrative Procedure Act which suggests that the duty and burden of determining the question of coverage in the first instance was intended to be shifted from the administrative agency to the courts."

Mr. Jenks: All right. How about the next one?

The Court: "To give effect to appellee's contention would, in most instances, sterilize the investigative power of the Administrator and force him to trial without the benefit of the very evidence which the subpoena is designed to secure."

Now, I don't know what evidence is going to be developed in your hearing before the Federal Trade Commission, but it would occur to me that at least they have the right to produce such evidence as they may think is proper.

Mr. Jenks: You are saying this, your Honor, and I think that all of the cases are against you——

The Court: Well, name one.

Mr. Jenks: Jones v. Securities and Exchange Commission. [24]

The Court: Well, that was decided many, many years before the Tobin case.

Mr. Jenks: Under identical statute.

The Court: I don't agree.

Mr. Jenks: And, as far as I know, it has never been reversed. You are saying that where as a matter of law an administrative agency has no authority, that a citizen is still compelled to submit to their subpoena, to have his private affairs examined, to

go through the administrative process before he can bring that up in court, where they have no authority whatever as a matter of law, and that's what I am urging.

If you say, if you first determine that as a matter of law, the Federal Trade Commission has jurisdiction over Fireman's Fund advertising, I think you might be right. But not until that is determined.

If Section 789 has pre-empted the field as far as the California insurance company is concerned, then Congress by Public Law 15 has taken all authority away from the Federal Trade Commission, they have no authority to proceed, and this Court—and the only way open to us is this way. We couldn't enjoin them, I know that, but we can ask you to quash the subpoena because they have no authority and that's all I am asking you.

The Court: Well, that's where we differ. [25]

Mr. Jenks: And that's what I think, "in accordance with law" means. If it doesn't mean that, I don't know what it means, your Honor. You are to inquire. At this point you are saying you won't inquire.

The Court: Well, the subpoena is properly issued, isn't it?

Mr. Jenks: "The court is to inquire into the situation and so far as the subpoena is found in accordance with law issue an order."

Now——

The Court: Do you contend anywhere along the line that this body does not have the power to issue a subpoena?

Mr. Jenks: I claim——

The Court: ——that this subpoena was not issued by a proper officer?

Mr. Jenks: No, I don't claim that. But I do claim this, that the Federal Trade Commission would have no authority to issue a subpoena in a matter which was in the jurisdiction of the Federal Power Commission, and this is no more within the jurisdiction of the Federal Trade Commission than matters which are in the jurisdiction of the Federal Power Commission or the Securities and Exchange Commission. The Federal Trade Commission must get its power from the Federal Trade Act as amended by Public Law 15, and I am asking your Honor to determine if Public Law [26] 15 in this situation, as a matter of law, has not taken all authority away from the Federal Trade Commission. That is our contention: every bit of their authority, your Honor.

The Court: That's where I can't agree with you, Mr. Jenks. We can continue this discussion for some time, but I can't believe that this Court should under the authorities take away from the administrative body the right to develop what they contend they can develop. Whether they can develop it or not is another matter. I don't know whether they can or not.

Mr. Jenks: Well, before your Honor makes a final ruling, may I—I have been looking for one passage in the Tobin case which I have now found—on page 224, in the right-hand part:

> "The first contention urged for reversal is that the District Court erred in holding that judicial enforcement of the subpoena duces tecum was depending upon a prior adjudication that the employees of the employer sought to be investigated are not within the coverage of the Act. This is not a novel issue, but is one which we have previously considered. (Citing authorities.) In the last cited case we expressly refrained from deciding whether the question of coverage was a proper subject for determination on application for enforcement of a subpoena duces tecum, but held [27] that in the absence of a clear showing of unreasonableness or gross abuse of the administrative investigative function, the courts will not interfere with an investigation 'merely in order to render an anticipatory judgment on the merits.' The courts will not interfere with an investigation."

Then they cite the Endicott-Johnson case which held the Secretary of Labor was entitled to an enforcement of her subpoena duces tecum issued pursuant to and in aid of her investigative duties under the Walsh-Healey Public Contracts Act and that the District Court was not authorized to decide the question of coverage in the enforcement proceeding.

> "Expressing the view that 'Congress has authorized the Administrator (of the Wage and Hour Division, Department of Labor) rather than the District Court in the first instance to determine the question of coverage in the pre-

liminary investigation of possibly existing violations,' the Supreme Court, in Oklahoma Press Publishing Company v. Walling, 327 U. S. 186, held that the Administrator is entitled to enforcement of a subpoena duces tecum, issued in aid of his investigative duties and designed to facilitate his determination of whether provisions of the Fair Labor Standards Act were being violated, without a prior adjudication that the industry sought [28] to be investigated is subject to the provisions of the Act.

"These authorities are determinative of the question presented, unless, as contended by appellee, they were abrogated by Section 6(C) of the Administrative Procedure Act."

I wouldn't be here, your Honor, if this was an investigation. If this subpoena had been issued pursuant to the investigative powers of the Commission, I wouldn't be here.

They have made their investigation. They have power to investigate. I don't deny that. Now they seek to regulate and Congress has taken away from them the power to regulate a California corporation. That's the distinction between the Tobin case and our case. It is in those portions I have read.

The Tobin case, when you read footnote 1, that has to be the basis for—headnote 1 for headnote 2. The investigative power as opposed to the judicative power. They are now seeking to regulate. I admit their power to investigate. I deny their power to regulate, and that is the distinction.

The Court: Is the matter submitted?

Mr. Brookfield: Beg your pardon?

The Court: Is the matter submitted? [29]

Mr. Brookfield: Yes.

The Court: The Court feels, as I have stated before, the District Court under the Act is required to enforce the issuance of the subpoena and the presentation of the evidence.

Now, the form of that order is a matter for counsel to discuss with the Court.

Mr. Jenks: Is your Honor including in that that they are entitled to testimony in documents regarding acts and practices in the states which have passed the model act?

The Court: What is that?

Mr. Jenks: In the states that passed the model act.

The Court: That is a matter of discussion, I think.

Mr. Jenks: In other words, we have this situation——

The Court: There is some regulation——

Mr. Jenks: Right.

The Court: There are certain states in which there is no regulation.

Mr. Jenks: That's correct. Now, I think that we can, Mr. Brookfield and I, can agree this far, then we come into a realm of possible disagreement. I think we can agree that certain states have passed the model act regulating advertising, the very act proposed to meet this problem. I am convinced from a report that I have from one of the trade

associations that there are 37 states, because either eight or nine adopted it this year. Mr. Brookfield thinks only one [30] adopted it. I think I would have to admit there are at least three states that do not purport to regulate advertising in the health and accident field. California, we would add to the states that do purport to regulate the health and accident field. So I say there are at least 38.

In between those there are certain other states, I think, who do have statutes similar to California; I am not prepared to tell you which they are at this moment.

Then we come into a question of five or six states that regulate life insurance advertising. We come to the question of whether life insurance is broad enough to cover disability insurance.

But if your Honor is going to issue the order, I think that it should be restricted to states which have no regulation. Now, Mr. Brookfield, I think, will urge this on you, again talking about the power of the states to control an interstate transaction; he will say that if a policy is sold in a state which has the model act, the company's home office is in another state which also has the model act, and the policy is issued at the home office, that the Federal Trade Commission has jurisdiction of that transaction. I suggest to you that if that is true, Public Law 15 is just torn out of the books. There may be some insurance companies that operate only in one state. There may be some insurance companies which do operate in only one state and which never [31] had a policy holder move to another

state so that renewals are coming from another state. There may be some little insurance companies that have been able to isolate their business, but insurance today, as pointed out in the Southeastern Underwriters case, is nationwide, and the obvious purpose of the statute was to permit each state to regulate the transactions at least within its own state.

Therefore, it is our contention that if a policy is sold in a state which has the model act, it makes no difference where the policy is issued, in that state or some other state, a state which has no regulation or a state which has also a model act; that the transaction, the entire transaction, even though it later goes across state lines, is without the power of the Federal Trade Commission to regulate if the sale was in a model act state, that's where the advertising was used.

There is nothing new in the concept that states without regulating interstate commerce can pass laws which have effect in other states and each of the cases which have discussed the McCarren Act since it was passed, or Public Law 15, as it is called, one and sometimes the other, has certainly indicated that position. The first one, United States Supreme Court in the Prudential case, said it was obviously the purpose of Congress to give effect to the present and future different and differing regulatory laws [32] of the states. So to say, as they will attempt to say—know this from discussions and from the statement made in the record—that they have jurisdiction over the advertising disseminated,

let's say, for example, in Michigan, which has the model act, merely because the policy might be issued in Chicago, is to tear Public Law 15 out of the books, and I suggest to you that if an order is issued it should be limited to those states which as a matter of law have no regulation and should not permit any evidence in any of the others.

Further, I would like to, while I am standing here, say this: We would like a stay of the order to permit us to appeal.

Mr. Brookfield: I respectfully submit that the subpoena should be enforced as set out in the subpoena itself.

I don't think that whether or not certain states have adopted the model code would have any effect in the court determining the nature of the subpoena, unless the court determines that the subpoena is too broad. But I believe your Honor has discretion.

But it is the contention of the Commission that until the McCarran Act, Public Law 15, is interpreted adversely to it, that we have jurisdiction in interstate transactions, even betweeen the regulated states, because of the fact that they do cross state lines, that the company in its home office cannot control the advertising of its agents in other [33] states and the other states in turn cannot control the acts of the company in its home office. Therefore, I respectfully submit that the complaint be not limited in any manner.

The Court: There is a form of subpoena attached to the documents on file?

Mr. Brookfield: Yes, sir.

The Court: Under your thoughts, Mr. Jenks, the Court would have to inquire into which states in the United States have attempted to regulate, which ones have not; which ones have passed the model act, and possibly—if there was some regulation—it might not be adequate in some states—whether the adequacy of that regulation—Is that your thought?

Mr. Jenks: That is one way of expressing it. I am saying this. I may be repeating part of my earlier argument, but now I am talking right within the field of Public Law 15. Congress has clearly said in Public Law 15 that the Federal Trade Commission has no jurisdiction somewhere. I claim that they have no jurisdiction over any California corporation anywhere.

The Court: But aren't you anticipating here? In other words, this is the start of this hearing. It may be that if the Federal Trade Commission issues some order or some regulation after the hearing has been had and after the evidence is in which is in violation of Public Law 15, that you then have the right to complain about that law and come [34] to a court to have it determined. But at the moment this is the obtaining of evidence as to what actually has been done.

Mr. Jenks: I am talking not about evidence, your Honor. I am talking about a matter of law.

The Court: They are asking for evidence.

Mr. Jenks: Certainly Congress intended to say that there were certain states in which the Federal Trade Commission could not regulate. Now, as to those states, if they can't regulate, they have no

power to issue a complaint, they have no power to issue a subpoena. I might point out to you, which is not in the record before you but I am sure that it will be admitted, that I have done everything I can to exhaust our administrative remedies to date. I filed a motion to dismiss, which went before the hearing examiner. He denied it. I took an appeal. The Commission denied the appeal, saying that they wouldn't consider it as an interlocutory matter. When the subpoena was issued—there were three subpoenas—this is the one we used for the test. When the subpoena was issued, I filed a motion to quash or in the alternative to limit. The alternative to limit was to limit it to California. The examiner denied the motion to quash and granted the motion to limit. He granted it because, if you have read the record, they don't claim any jurisdiction in California.

The Court: I read the record. [35]

Mr. Jenks: All right. They don't claim jurisdiction over us here. So the examiner has said they cannot produce evidence of our transactions in California. So when he denied that, I appealed from that and while I haven't received the order yet, I received a telegram last Friday that the Commission had denied the appeal.

We have attempted to exhaust our administrative remedies. We are asking here the aid of this Court because the Commission, in our opinion, first, the hearing examiner, by denying these motions, and the Commission by upholding his orders, has placed

us in the position of defending a situation where we claim and we ask the Court's aid to look into it, that Congress has taken away from the Federal Trade Commission its authority, and as the United States Supreme Court has said from the beginning of time, that if the agency has no authority it cannot proceed.

The Jones v. Securities and Exchange Commission case, which I mentioned, referred to a case in 32 Fed. 2d. and said:

> "We have consistently cited that case and approve it."

The position there is that they had no authority. The reason why they had, one case may be factual, one case may not be. In Jones v. SEC, Mr. Jones filed a registration statement. The Commission issued a stop order, claiming [36] they were false statements. Mr. Jones withdrew his registration statement. The Commission then issued a subpoena. He refused to obey it. The District Court issued an order enforcing it. The Court reversed, saying that once the registration statement was withdrawn the Commission had no authority to proceed and therefore the subpoena was improper and quashed.

Now, we are saying that there is at least some place in the United States under this act, and it was Congress' obvious purpose to take away authority, and we are merely asking the Court to determine that in certain states there is no authority. They admit no authority in California, but they do want to say this, that if we sell a policy in California—

I think they want to say this—or maybe I better put it the other way around, Mr. Brookfield. We sell a policy in Nevada and issue it in California: they have complete authority. Now, at the moment I don't know whether Nevada has one of the statutes. I know Michigan has. We all admit Michigan is a model act state. So if we sell a policy in Michigan and issue it in California, where they don't claim jurisdiction, they claim jurisdiction over the whole transaction, and if that isn't just the thing that Congress intended to prevent, I don't know why they ever passed the McCarren Act.

The Court: Some higher court is going to [37] determine that, Mr. Jenks. I would like to have a form—What is that?

What is that?

Mr. Jenks: I think the Supreme Court determined that. They said it three times.

The Court: Well, I would like to have a form of order submitted to me.

Mr. Brookfield: I have such a form.

The Court: Have you shown it to counsel?

Mr. Jenks: No.

The Court: I would like to have such a form——

(Discussion between counsel.)

Mr. Jenks: If I may say this, I don't know how to tell you to draw it, but it immediately raises this question. It is just the question we have been talking about, starting with the third line on the second page:

"To answer at said time and place every question relevant and material to said proceed-

ing and necessary and proper to the conduct thereof."

and I claim that no question regarding activities of the state which has regulation is or can be relevant and material. In other words, I am asking your Honor to say now, which I think is Public Law 15, that Congress did not permit—intend to permit the Federal Trade Commission to regulate the sale of insurance in one state merely because the policy was issued in another, and that is what they are asking you to do. [38]

The Court: Well, eventually, I take it, the Federal Trade Commission will or will not make some order, either regulating a company in this state or some other state or wherever it may do or not do that, and it will do it upon the basis of the evidence that is produced at this hearing, and at that time, if the Commission has done something that is in violation of Public Law 15, it would seem to me that would be the time that you could complain about whether you complied with that law or did not. There is nothing before me now to indicate any states that have a model law. I have no evidence of any kind presented to me. Your sole answer is the jurisdiction of the Commission to go into this matter.

Mr. Jenks: That's right.

The Court: I think they have a right to at least investigate under the statute. Now, what their order will be or whether it will be proper or beyond the limits of Public Law 15 or not, is a matter to be

determined at some future time when an order is made.

Mr. Jenks: I wouldn't disagree with you. As I said before, they have the power to investigate, your Honor. They have passed that stage when they issued a complaint. Now I would like to say this about the order in the form it is submitted. They ask your Honor to set a time and place. I think that that is improper because unless you set it sufficiently further beyond October, to give us our [39] opportunity to appeal. When I was with the Securities and Exchange Commission, we always prepared orders to appear at a time and place to be set on notice by the hearing examiner and then we would stay the order for a period of time so that an appeal could be taken.

The Court: Have you any objection to that?

Mr. Brookfield: If your Honor please, only to the extent that we are here in California from Washington. Mr. Jenks is correct when he states that he is entitled to an appeal directly to the Circuit Court without any contempt proceedings. I think he is entitled to that. There is a hearing scheduled before the examiner at 2:00 o'clock this afternoon, and at that time I expect Mr. Jenks and I probably will be able to arrange for subsequent hearings.

I would like the date, if your Honor please, to be left open so that we can have this hearing before the hearing examiner this afternoon——

The Court: I can't leave it open. You have a blank space provided here. I can't leave it open.

I think Mr. Jenks' suggestion to have time and place fixed by the hearing examiner would cover the situation. Wouldn't it?

Mr. Brookfield: I think so.

The Court: Because they certainly have a right to take time to file an appeal and prosecute that appeal.

Mr. Brookfield: I think so. [40]

The Court: So do you have the form of order there? How do you suggest, Mr. Jenks, that that wording be changed?

Mr. Jenks: Well, the order, if the application is hereby granted, that Mr. Crafts be ordered to appear at a time and place to be set by the Federal Trade Commissioner or a trial examiner thereof.

The reason that I am——

The Court: Do you have a particular trial examiner?

Mr. Jenks: Well, there is a situation developing, your Honor. We already know that one of their trial examiners is going to be moved to San Francisco. He will be here in January.

The Court: Then you agree upon the wording of that, Mr. Brookfield and Mr. Jenks, and bring it in to me in chambers and we will take care of it.

Mr. Jenks: May we—your Honor, I think we should have a right to apply to you for it—May we have an order staying this pending an appeal and, if the appeal is filed, during the appeal?

The Court: Yes, I would be perfectly willing to make such an order. I don't know whether any time is required on that or not.

Mr. Jenks: I think you have the right, or the Circuit Court, either one, to stay it pending appeal. I think you have the initial right. [41]

The Court: I am perfectly willing to grant a stay pending appeal.

Mr. Jenks: Pending and during the appeal.

The Court: Yes.

Work out the words to that order and bring in to chambers.

(Matter submitted.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 42 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ [Indistinguishable.]

[Endorsed]: Filed November 25, 1955. [42]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompany-

ing documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the Attorneys for the Appellant:

Application for Order Requiring Giving of Evidence.

Answer of Defendant to Application.

Order Requiring Giving of Evidence and Production of Documentary Evidence.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Reporter's Transcript of Proceedings of Hearing, October 21, 1955.

Defendant's Exhibit A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of December, 1955.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 14972. United States Court of Appeals for the Ninth Circuit. James F. Crafts, Appellant, vs. Federal Trade Commission, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 8, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14972

JAMES F. CRAFTS,

Appellant,

vs.

FEDERAL TRADE COMMISSION,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

On Appeal From an Order of the United States Court for the Northern District of California, Southern Division, Enforcing a Subpoena Duces Tecum Issued by the Federal Trade Commission in an Adjudicative Administrative Proceeding

James F. Crafts, the appellant herein, hereby files a Statement of Points on which he intends to rely, which are as follows:

1. The District Court before issuing the order enforcing the subpoena duces tecum in an adjudicative administrative proceeding should have inquired into the jurisdiction of the Federal Trade Commission to maintain the administrative proceeding, to issue the subpoena and to regulate the acts and practices upon which the administrative proceeding is based. The refusal of the District Court to consider these questions is contrary to law. Further,

the interpretation of the Administrative Procedure Act as prohibiting such an inquiry into jurisdiction misconstrues the statute and might render it unconstitutional.

2. The jurisdiction of the Federal Trade Commission to regulate the business of insurance is specifically limited by Public Law 15, 79th Congress (15 U.S.C. 1011-1015), and the Federal Trade Commission may regulate such business only to the extent that it "is not regulated by state law." Fireman's Fund Indemnity Company, the respondent in this administrative proceeding, is a California insurance company regulated by the laws of the State of California. The regulations imposed by the laws of the State of California as the domiciliary state constitute complete regulation of all of the acts and practices upon which the administrative proceeding is based. Therefore, the Federal Trade Commission has no jurisdiction over these acts and practices, and the order enforcing the subpoena is contrary to law.

3. It is a matter of judicial notice that all states, with a possible exception of Missouri, Rhode Island, Montana, Mississippi and the District of Columbia, have statutes which regulate the acts and practices upon which the administrative proceeding is based. Therefore, even if the regulation by the laws of the State of California as domiciliary state is construed as applicable only within the domiciliary state, the evidence required by the subpoena should have been limited to the few states which have no regulatory

statutes, and the refusal of the District Court at least to so limit its order enforcing the subpoena is contrary to law.

James F. Crafts, as appellant herein, hereby designates as the record material to the consideration of this appeal the entire record herein, including this Statement of Points and Designation of Record.

Dated: San Francisco, California, December 14, 1955.

/s/ CHRISTOPHER M. JENKS,

CHRISTOPHER M. JENKS, and
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 14, 1955.

Office - Supreme Court, U.S.
FILED
JUN 27 1957
JOHN T. FEY, Clerk

No. [redacted] 229

In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

JAMES F. CRAFTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
CHARLES H. WESTON,
Attorney,
Department of Justice, Washington 25, D. C.

EARL W. KINTNER,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission,
Washington 25, D. C.

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CITATIONS

Cases:	
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Federal Trade Commission v. *Sewell*, No. 823, this Term, decided May 27, 1957	10
National Casualty Co. v. *Federal Trade Commission*, No. 12944, decided by the Court of Appeals for the Sixth Circuit on June 6, 1957	9
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Statutes:	
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Federal Trade Commission Act of September 26, 1914, 38 Stat. 717, as amended; 15 U. S. C. 41, *et seq.*	5, 7, 9
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

JAMES F. CRAFTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above cause on February 27, 1957.

OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 11–36) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1957 (Appendix B, *infra*, p. 37). The time for filing a petition for writ of certiorari was extended by Mr. Justice Douglas on May 21, 1957, to June 27, 1957 (Appendix C, *infra*, p. 38).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an action to enforce a subpoena issued by the Federal Trade Commission in a proceeding to determine whether an insurance company is violating Section 5 of the Federal Trade Commission Act may properly be ordered dismissed by a court of appeals because of its conclusion of law that such proceeding is, in whole or in part, not within the Commission's statutory authority.

STATUTES INVOLVED

The Federal Trade Commission Act of September 26, 1914, 38 Stat. 717, as amended, 66 Stat. 632, provides in part as follows:

> SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. [15 U. S. C. 45 (a) (1)]
>
> * * * * *
>
> SEC. 9. For the purposes of this Act * * * the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *.
>
> * * * * *
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to

appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. [15 U. S. C. 49]

* * * * *

Section 2 of the Act of March 9, 1945, 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. 1012, provides in part:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, * * * the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

STATEMENT

In this case, the Federal Trade Commission issued a complaint alleging that Fireman's Fund Indemnity Company (Indemnity Company), a California corporation licensed to do business in all 48 states and the District of Columbia, had been disseminating in interstate commerce and through the United States mails advertising material which made false and misleading representations concerning the terms and conditions

of contracts of insurance which it entered into in the various states (R. 8–10).[1] The complaint charged that Indemnity Company thereby used unfair and deceptive acts and practices in interstate commerce prohibited by the Federal Trade Commission Act (R. 16). The complaint also alleged that Indemnity Company was making insurance contracts in various states "in which the business of insurance is not regulated by state laws to the extent of regulating the practices of respondent alleged in this complaint to be illegal" (R. 9).

The Commission issued a subpoena to respondent, the president of Indemnity Company, to appear at the hearing of this complaint to testify at the instance of the Commission and to produce designated books and records of Indemnity Company (R. 20–21). On respondent's motion to quash, counsel for the Commission stated that they did not require the production of information relating to intrastate transactions within California, and the hearing examiner ordered such data excluded from the scope of the subpoena (R. 27, 42, 91). Respondent appeared at the hearing and stated that he had in two brief cases the available material called for by the subpoena (R. 34), but he refused to testify or to produce this material upon the ground that the Commission had no jurisdiction to maintain the proceedings against Indemnity Company (R. 37, 42–43).

On the Commission's application to the District Court (N. D. Cal.) under Section 9 of the Trade Commission Act, the court entered an order enforcing

[1] We use the designation "R." to refer to the printed transcript of record in the court below.

compliance with the Commission's subpoena (R. 46–47). The Court of Appeals, in an opinion by Judge Fee, reversed and directed dismissal of the enforcement proceeding. The grounds of decision are not entirely clear. The court referred to the proviso of Section 2 (b) of the McCarran-Ferguson Insurance Regulation Act—that the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law"—and said that it would be improper to rule upon the limits thereby set on the Commission's authority "except insofar as these may affect breadth of the demand of the subpoena" (*infra*, p. 30). The court then held that the subpoena was "too broad" since it "demanded in mass all books, papers and records of the Indemnity Company including those relating to the intrastate business of that company in California * * *" (*infra*, p. 35). According to the court, "the subpoena was so broad on its face * * * that it would have been almost impossible to frame appropriate phrases of limitation" (*infra*, p. 34), and it was invalid *in toto* because "the phraseology was such that the court had no means of segregation of items, if any, over which the Commission had jurisdiction from those as to which Congress had explicitly denied them authority" (*infra*, pp. 35–36).

REASONS FOR GRANTING THE WRIT

It is settled that, where the respondent in an administrative proceeding raises an issue as to "coverage" of the applicable statute, initial determination of this issue is to be made by the agency and not by a court on application to enforce an administrative

subpoena. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Oklahoma Press* v. *Walling*, 327 U. S. 186. The rationale of these decisions is that Congress, when it provides for administrative enforcement of a statute, empowers the administrative agency to determine initially whether particular conduct comes within the statutory prohibitions. In *Endicott Johnson*, this Court held that a district court may not rule on this question in a proceeding to enforce an administrative subpoena, thereby "anticipating and foreclosing" administrative determination, and disabling the administrative agency "from rendering a complete decision on the alleged violation as Congress had directed". 317 U. S. at 509.

If the court below had dismissed the proceeding upon the ground that the demand was for documents relating to a matter not within the Commission's statutory authority, this would plainly be in conflict with *Endicott Johnson* and *Oklahoma Press*. The apparent ground of dismissal in this case—that the demands of the subpoena did not permit differentiation between documents pertaining and those not pertaining to matters upon which the Commission was authorized to act—is equally grounded upon the court's view as to the limits of the administrative agency's statutory authority, and equally interferes with obtaining information pertinent to the question of violation of the statute. Indeed, if it is error to deny subpoena enforcement upon the ground that the information sought relates to a matter not within the statutory prohibition, *a fortiori* it is error to deny enforcement upon the ground that the information

sought relates *in part* to matters not within the statutory prohibition.

The court below said that *Endicott Johnson* and other like decisions dealt with the "coverage" of the applicable statutes, and were not applicable where the issue was the "jurisdiction" of the administrative agency (*infra*, pp. 27, 31). We submit that the court's suggested distinction is a purely verbal one. The statutory authority of the administrative agency is equally involved whether phrased in terms of the statute's "coverage" or in terms of the administrative agency's "jurisdiction".

While a court may properly deny enforcement of an administrative subpoena when the evidence sought is "plainly incompetent or irrelevant to any lawful purpose" of the agency (317 U. S. at 509), here the statute explicitly makes the Federal Trade Commission Act applicable to the business of insurance under some circumstances. The Commission's subpoena sought information material to determining the applicability of the Act. If the Commission, after obtaining such information, should resolve that issue erroneously and issue an order which transcends its statutory authority, the order can be modified or set aside on judicial review.

Here there is no question of an excessive or burdensome demand. When respondent appeared at the Commission hearing, the material demanded was already assembled and contained in two brief cases (*supra*, p. 4). Compare *Civil Aeronautics Board* v. *Hermann*, 353 U. S. 322, reversing *per curiam* 237 F. 2d 359 (C. A. 9).

In stating that the records and documents demanded included those "relating to the intrastate business" of Indemnity Company in California (*infra,* p. 35), the court below was plainly in error. As already noted (*supra,* p. 4), the hearing examiner limited the demand to data relating to interstate transactions. Throughout the entire proceeding, this fact was known, understood, and accepted by all parties. The Commission's counsel had informed respondent when he appeared at the Commission hearing that the Commission was not seeking information concerning "the dissemination of advertising or sales in California" (R. 42). During argument in the District Court, counsel for the respondent stated that "they don't claim any jurisdiction in California" and "So the examiner has said they cannot produce evidence of our transactions in California" (R. 91). And, in his brief in the court below (pp. 3, 4), respondent pointed out that the Commission was not asserting jurisdiction "as to California," and that the hearing examiner had granted his motion to quash the subpoena to that extent. In any event, even assuming *arguendo* that the Commission had sought intrastate data, the Court of Appeals should have narrowed the scope of the subpoena instead of dismissing the proceeding. Moreover, the subpoena sought testimony from respondent as well as documents, and any defect in the demand for documents could not excuse respondent from testifying.

Under the decision below, the Commission is for all practical purposes precluded from developing the facts on the basis of which it can be determined

to what extent the Commission has jurisdiction over the business of insurance. The Commission has filed 41 complaints against insurance companies charging violations of the Federal Trade Commission Act, in thirteen of which proceedings cease and desist orders already have been issued. The decision, if allowed to stand, is likely to encourage resistance to subpoenas in the pending cases against insurance companies. Nor is the effect of the decision confined to proceedings against insurance companies. It can be cited as an authority in any subpoena enforcement proceeding in which the "jurisdiction" of the Federal Trade Commission or that of another administrative agency is drawn in issue.

Orders of the Commission directed against insurance companies have been passed upon in two recent cases: *American Hospital and Life Insurance Co.* v. *Federal Trade Commission,* No. 16132, decided by the Court of Appeals for the Fifth Circuit on April 9, 1957; and *National Casualty Co.* v. *Federal Trade Commission,* No. 12944, decided by the Court of Appeals for the Sixth Circuit on June 6, 1957. The former case held that the Commission was without jurisdiction of the acts of which it complained, but in the latter case the court recognized the Commission's jurisdiction over acts of insurance companies in states which did not have a statute prohibiting unfair or deceptive acts or practices by insurance companies, and the court remanded the cause to the Commission for further proceedings.

irrespective of the correctness of those decisions[2] in interpreting the scope of the Commission's authority under the McCarran-Ferguson Insurance Regulation Act, enforcement of subpoenas issued by the Commission in proceedings against insurance companies remains a matter of major importance.

CONCLUSION

We believe that the decision below is clearly erroneous and that the questions presented have already been authoritatively settled by this Court. It is suggested, therefore, that the Court may consider it appropriate to grant certiorari and reverse the judgment without further briefs or argument. Cf. *Federal Trade Commission* v. *Carter Products, Inc.*, 346 U. S. 327; *Federal Trade Commission* v. *American Crayon Co.*, 350 U. S. 907, 352 U. S. 806; *Federal Trade Commission* v. *Sewell*, No. 823, this Term, decided May 27, 1957.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

CHARLES H. WESTON,
Attorney.

EARL W. KINTNER,
General Counsel,

ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

JUNE 1957.

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[2] The Government is at present considering whether to apply for certiorari in these two cases.

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: LEMMON, FEE and CHAMBERS, *Circuit Judges*

JAMES ALGER FEE, *Circuit Judge:*

This is an appeal from an order enforcing a subpoena duces tecum issued by the Federal Trade Commission to Crafts in a proceeding against Fireman's Fund Indemnity Company. The trial court issued an order as follows:

> "ORDER REQUIRING THE GIVING OF EVIDENCE AND THE PRODUCTION OF DOCUMENTARY EVIDENCE
>
> "The Federal Trade Commission, having invoked the aid of this Court in requiring the attendance and testimony of James F. Crafts and the production of documentary evidence by James F. Crafts, as a witness in a proceeding instituted by the Federal Trade Commission against Fireman's Fund Indemnity Company (D. 6310), and
>
> "The Court having considered the application, it is hereby
>
> "Ordered: That the application be, and the same hereby is granted, and that the said James F. Crafts be, and he is, hereby ordered to appear upon not less than ten days' notice at a time and place to be set by the Federal Trade Commission or a Hearing Examiner thereof designated by the said Commission to take testimony and receive evidence, and to perform all other duties authorized by law in the prosecution of the inquiry pending before said Com-

mission entitled, 'In the Matter of Fireman's Fund Indemnity Company, a corporation, Docket No. 6310,' or an examiner subsequent hereto designated by it for such purposes, to give evidence and testimony at the aforesaid time and place touching matters brought in question by the complaint of the Federal Trade Commission against Fireman's Fund Indemnity Company, a corporation, and the answer thereto, to then and there produce the documentary evidence identified and described in a subpoena issued by the said Commission, on September 22, 1955, and already served upon said James F. Crafts, and which the said James F. Crafts has not produced, and to answer at said time and place every question relevant and material to said proceeding and necessary and proper to the conduct thereof and to attend before said Examiner of the Federal Trade Commission from day to day until his examination shall have been completed.

"It Is Further Ordered: That this Order and its effectiveness be and the same is hereby stayed for the time permitted by law for an appeal therefrom, and if such appeal is filed, thereafter until final determination of such appeal."

The subpoena which was thus enforced read:

"United States of America Federal Trade Commission

"SUBPOENA DUCES TECUM

"To Mr. JAMES F. CRAFTS, Fireman's Fund Indemnity Company, 401 California Street, San Francisco 20, California.

"You are hereby required to appear before J. Earl Cox, a Hearing Examiner of the Federal Trade Commission, at Room 261, U. S. Post Office and Court House, 7th and Mission Streets in the City of San Francisco, Cali-

fornia, on the 17th day of October, 1955, at ten o'clock a.m., of that day, to testify at the instance of the Federal Trade Commission in the Matter of Fireman's Fund Indemnity Company, Docket No. 6310, and you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: described in Schedule 'A' attached hereto and incorporated by reference as if fully rewritten herein.

"Fail not at your peril.

"In testimony whereof, the undersigned, a Hearing Examiner of the Federal Trade Commission, has hereunto set his hand and the said Federal Trade Commission has caused its seal to be affixed at Washington, D. C., this 22nd day of September, 1955.

[SEAL] /s/ J. EARL COX,
Hearing Examiner.

"Schedule 'A'

"1. One copy of each form letter, bulletin, circular, folder, brochure, stuffer, newspaper advertisement, magazine advertisement, or other written or printed advertising material which was disseminated by respondent Fireman's Fund Indemnity Company (hereinafter described in this Schedule 'A' as respondent) to the general public, or to its employees or agents for dissemination to the general public or which was disseminated to the general public by any person, partnership, or corporation with the permission of, request of, order by, or under the terms of any contract with the respondent from March 1, 1954, to date, which advertised, described, or related to any of the accident and health insurance policies named in the complaint or any policies issued by the respondent since March 1, 1954, as substitutes or modifications for such policies.

"2. All contracts, memorandums of agreement, or correspondence between respondent,

its officers, agents, employees, or contractors, or any records, books of accounts, or verified summaries thereof which have reference to the following listed advertisements and which show on a state by state basis volume of dissemination of such advertisements by respondent to the general public or to its agents for redissemination to the general public during the years 1953 and 1954.

1. Form letter of A & H No. 2.
2. Form letter of A & H No. 7.
3. Form letter of A & H No. 9.
4. Form letter of A & H No. 10.
5. Circular bearing form No. A & H 4800.
6. Postcard bearing form No. A & H 4800–A.
7. Circular bearing form No. A & H 4801.
8. Postcard bearing form No. A & H 4801–A.
9. Circular bearing form No. A & H 4803.
10. Postcard bearing form No. A & H 4803–A.
11. Pamphlet bearing form No. A & H 4804.
12. Pamphlet bearing form No. A & H 4807.

"3. One specimen copy of each accident and health insurance policy issued by respondent since March 1, 1954, as a substitute or modification for any of the accident and health insurance policies named in the complaint.

"4. Original books, records, or accounts of the respondent, or verified summaries thereof, showing: the dollar volume of the premium receipts received by it from insureds residing in each of the several states of the United States and in the District of Columbia during the years 1953 and 1954 to whom respondent has issued during those years one or more of the following listed policies on a family or group basis; or the total number of such policies is-

sued by respondent during the years 1953 and 1954 in each of the several states of the United States and the District of Columbia:

1. The Basic Equity Accident Policy (No. BA).
2. The Basic Income Equity Accident Policy (No. BAI).
3. The Basic Equity Life and Limb Accident Policy (No. BAL).
4. The Basic Health Policy (No. BHP).
5. The Budget Hospital and Medical Policy (No. GMA).
6. The Hospital Nurses and Expense Policy (No. HNE).
7. Hospital and Medical Policy (No. IMH).
8. Polio Policy (No. PS).

"[Endorsed]: Filed October 18, 1955."

The complaint in the original proceeding is of extremely broad scope:

"United States of America Before Federal Trade Commission

Docket No. 6310

"In the Matter of:

FIREMAN'S FUND INDEMNITY COMPANY, a Corporation

"COMPLAINT

"Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fireman's Fund Indemnity Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding

by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

"Paragraph One: Respondent, Fireman's Fund Indemnity Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 410 California Street, San Francisco, California.

"Paragraph Two: Respondent is now, and for more than two years last past has been, engaged as an insurer in the business of insurance in commerce, as 'commerce' is defined in the Federal Trade Commission Act, by entering into insurance contracts with insureds located in various States of the United States in which the business of insurance is not regulated by state law to the extent of regulating the practices of respondent alleged in this complaint to be illegal. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said insurance policies in commerce between and among the several States of the United States.

"Respondent, during the two years last past, has sold insurance indemnification in a variety of policies, among which are the following:

1. The Basic Equity Accident Policy (No. BA).
2. The Basic Income Equity Accident Policy (No. BAI).
3. The Basic Equity Life and Limb Accident Policy (No. BAL).
4. The Basic Health Policy (No. BHP).
5. The Budget Hospital and Medical Policy (No. GMA).
6. The Hospital Nurses and Expense Policy (No. HNE).

7. Hospital and Medical Policy (No. IHM).
8. Polio Policy (No. PS).

"Paragraph Three: Respondent is licensed, as provided by the respective State laws, to engage in the business of insurance, as heretofore generally described, in all of the forty-eight States of the United States and the District of Columbia.

"Paragraph Four: In the course and conduct of its aforesaid business, respondent, during the two years last past, disseminated, and caused to be disseminated, in the form of printed and written matter, false, misleading and deceptive advertising statements concerning the terms and provisions of its contracts of insurance, as reflected by policies as aforesaid. These statements were disseminated by letters, bulletins, circulars, etc., through the United States mail and by other means; or through its agents in commerce, between and among the various States of the United States. The purpose and effect of these statements was and is to induce members of the public to become insured by the respondent under the terms and provisions of the policies advertised.

"Paragraph Five: In the course and conduct of its said business in said commerce, as aforesaid, the respondent has disseminated, among others of similar import and meaning, not herein set out, advertisements relating to its said policies containing the statements hereinafter set forth:

1. 'Available to Males ages 18-54 . . . Females 18-54 . . . Renewable to age 70.'
2. 'A Perfect Combination for Full Coverage Disability Insurance.'

'Let Accident and Health Insurance Protect Your Income as Fire Insurance Protects Your Home.'

'Adequate Sickness Protection Combined With Sound Accident Insurance.'

'Basic Coverages

Hospital Confinement cases:	Benefits Plan A
1. Hospital room and board for a period not exceeding 100 days for any one disease or injury,	
Adults, per day up to	$5.00
Children, per day up to	4.00
2. Actual expense incurred for operating room, anaesthesia, anaesthetist's fee, drugs, dressings, diagnostic X-ray and laboratory examinations, up to an aggregate maximum of	100.00
Ambulance Expense:	
Transportation to or from the hospital, up to	15.00'

'Optional Coverages

Surgical Operation Expense:	
Whether at hospital, doctor's office or home, schedule up to	$250.00
Housewives and Unemployed Females	187.50
Doctor's Visits During Hospital Confinement	
In non-surgical cases, reimbursement will be made for physician's fees up to a maximum of 100 days for each disease or injury, per day up to	3.00'
4. 'Loss of Business Time Weekly Income up to 52 Weeks	
Confining Illness Coverage from first day or with waiting period of 7, 14, 21 or 28 days.	

"Paragraph Six: Through the use of such statements and representations, and others of similar import and meaning, not specifically set out herein, the respondent represents and has represented directly or by implication, with respect to said policies of insurance, as follows:

1. That the policies providing indemnification against loss caused by accident or sickness may be continued at the option of the insured to a specific age or for life as long as the insured makes such premium payments within the time and in the

amounts as are required by the terms of the policy.

2. That complete indemnification is provided for any or all sickness, illnesses or accidents suffered by the insured.

3. (a) That indemnification is provided in the form of cash benefits for the payment of hospital room and board at the rate of $5.00 per day for a period not to exceed 100 days for any one disease or injury which may be suffered by the insured.

(b) That indemnification in the form of cash benefits in an amount up to $250.00 is provided for surgical expense incurred by the insured as a result of illness or injury.

(c) That indemnification is provided for doctors' visits in non-surgical cases during hospital confinement at the rate of $3.00 per day for a maximum 100 days for each sickness or injury suffered by the insured.

4. That indemnification is provided for any confining sickness which may be suffered by the insured during the policy term from the first day of such sickness or after a waiting period of 7, 14, 21, or 28 days as the policy may prescribe.

"Paragraph Seven: The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Contrary to the statements made in paragraph 1 of Paragraph Five, respondent's policies may not be renewed at the option of the insured until the age of 70 years or any other specific age by the timely payment of premiums in the amounts required by such policies. On the contrary, respondent's policies provide, in effect, that they are subject to cancellation by the respondent at any time for any reason or for no reason at all.

2. Contrary to the statement made in subparagraph 2 of Paragraph Five concerning respondent's Basic Health Policy and Basic Equity Accident Policy, the insured is not provided with complete indeminfication by such policies against any loss which may be incurred by reason of any or all sicknesses or accidents. For example, Respondent's Basic Health Policy provides, (a) in effect, that no cash benefits are payment for any loss due to sickness the cause of which is traceable to a condition existing prior to or within 15 days after the effective date of the policy; (b) any loss due to pregnancy, childbirth or miscarriage; and (c) suicide or any attempt threat, death, disability or other loss caused or contributed to, by disease or infection (except pyogenia infection) or injury sustained by the insured while in or on any aircraft or other device for air travel. Total disability benefits are only provided if the disability wholly and continuously disables the insured and prevents the insured from performing each and every duty pertaining to his occupation. Further, such total disability must occur within 30 days of the date of the accident.

3. Contrary to the statements made in subparagraph 3 of Paragraph Five:

(a) Respondent's Hospital and Medical Expense Policy (as referred to in subparagraph 3 (1) of Paragraph Five) does not provide indemnification for hospital room and board for a period not to exceed 100 days for any one disease or injury. On the contrary, such policy does not cover losses resulting from any illness the cause of which is traceable to a condition existing prior to or within 30 days of the effective date of the policy. Further, the

policy does not provide for the payment of cash benefits for losses resulting from insanity, pregnancy or childbirth, or any condition resulting therefrom; intentional self-inflicted injuries; or operations for removal of tonsils or adenoids, or both, upon children up to the age of 18; unless the policy has been in effect for at least 12 consecutive months. Also, it is to be noted that the policy provides that benefits payable thereunder shall be reduced 25% when the insured reaches 60 years of age and 50% when the insured reaches 65 years of age.

(b) Respondent's Hospital and Medical Expense Policy does not cover any surgical expense which may be suffered by the insured by reason of sickness or accident in all cases to a maximum of $250.00. The surgical benefits provided by the policy, if payable at all, are limited to the maximum amounts stated in the schedule of operations (Rider Form MSE) contained in the policy. This schedule lists 114 different types of operations. A maximum of $250.00 will be payable for surgical fees for only four of these types of operations. A maximum of $75.00 or less is provided for 90 of the listed types of operations.

(c) Respondent's Hospital and Medical Policy does not provide indemnification for doctors' visits to the insured during hospital confinement in all non-surgical cases. Instead, such policy excludes indemnification for this expense in many instances for the reasons previously stated in subsection (a) of this section.

4. Contrary to the statements contained in subparagraph 4 of Paragraph Five (which refer to respondent's Basic Health Policy) indemnification is not provided for the first day of any illness which may be

contracted by the insured during the policy term. Instead, such policy excludes payment for losses resulting from any sickness the cause of which originates on or prior to fifteen days after the effective date of the policy.

"Paragraph Eight: The use by the respondent of the aforesaid false and misleading statements and representations with respect to the terms and conditions of its said policies and its failure to reveal the limitations of said coverage found in said policies have had and now have the tendency and capacity to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and representations were and are true and to induce said portion of the purchasing public to purchase insurance coverage from the respondent because of said erroneous and mistaken belief.

"The aforesaid acts and practices of respondent, as herein alleged, are all to the prejuduce and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

"Wherefore, the Premises Considered, the Federal Trade Commission, on this 11th day of March, A. D. 1955, issues its complaint against said respondent."

Crafts appeals, claiming it is not shown that the proceeding lies within the power of the Commission and that the testimony and exhibits demanded are therefore not shown to be relevant to any inquiry within the jurisdiction of the administrative body to conduct. No claim of personal privilege is made.

The proceeding raised the question of whether Congress had not totally proscribed action by the Commission in the insurance field, albeit trafficking across

state lines in insurance now constitutes interstate commerce.[1] It must be determined at the outset whether the demand of the subpoena related specifically to any books, documents or other papers, the production of which the Commission had a right to require from this corporation or its officers, as being within the closely circumscribed area which Congress may have left remaining for Commission action as to insurance.

The two bases for the claim of the Commission that the order should be upheld cut diagonally across these fields.

First, it is said that the District Court had no authority to determine whether the Commission was empowered to bring the proceeding and issue the subpoena, and, second, it is argued that the only question involved is one of "coverage," which must be left to the discretion of the Commission. It will be demonstrated that neither of these contentions is sound. As paraphrased by the agency brief, the trial court took the position that "the subpoena must be enforced without deciding whether the appellant is covered by the statute, provided the subpoena is relevant to a legitimate field of inquiry and is otherwise reasonable." But it must be pointed out that even this test, so loosely defined, was not really employed by the trial court in the instant case.

The present proceeding to enforce the subpoena was frankly initiated in order to gain complete disclosure of all records by Fireman's Fund Indemnity Company without settling the question of the authority of the Commission to investigate that company in their present proceeding. Indeed, as noted above, the claim was made and was apparently accepted by the

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[1] *United States* vs. *South-Eastern Underwriters Association*, 322 U. S. 533, rehearing denied 323 U. S. 811.

trial judge that the District Court had no jurisdiction to consider whether the Commission had power to investigate this particular corporation at all. It is urged by the agency that this Court accept the interpretation of the Commission of its own powers for the purpose of making the investigation and that the breadth thereof can be reviewed when the final order in the main proceeding is attacked. We reject this limitation upon the jurisdiction of the trial court.

It cannot be too often reiterated that the attempt to enforce an administrative subpoena initiates a case or controversy.[2] All questions relating to jurisdiction of the court, authority of the administrative body, reasonableness of the demand under all the circumstances, with regard for due process and protection of individual rights, and relevancy of the testimony and documents demanded are justiciable. Since the Commission was asking for relief of an affirmative nature, it was incumbent upon that agency to establish affirmatively its legal power to act in the field, among other essentials. The postulate upon which any jurisdiction to act in the field of interstate commerce by the Commission depends is that Congress had not explicitly excluded such action by specific statute. The power of Congress to exclude completely such action under the Commerce Clause of the Federal Constitution cannot be denied. If the Commission were then precluded from regulation by Congress, it would have no power to act and the court would be bound so to declare.

The jurisdiction of the District Court and the extent of the area denied by Congress to the Commission in regulation of insurance in interstate commerce are the cardinal questions here. Therefore, the decision

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[2] *Interstate Commerce Commission* vs. *Brimson*, 154 U. S. 447, 489.

here is not affected by the principles set forth in cases recently decided by this Court. In these decisions, the element of personal privilege, the right of privacy, the right of a person to be secure from a general search and seizure and not to be required to be a witness against oneself as constitutionally guaranteed were discussed.[3] Here, as noted above, no claim of

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[3] These decisions turn on the propriety of judicial enforcement of subpoenas issued by various administrative agencies in the light of claims of personal privilege or privacy by those directly involved or by third parties to the proceeding. In *Boren* vs. *Tucker*, 9 Cir., No. 15010, filed December 3, 1956, it was held, so far as is important here, that the subpoena was reasonable in that the evidence sought was sufficiently material and relevant to the tax liability of the defendant taxpayers. In *Chapman* vs. *Maren Elwood College*, 9 Cir., 225 F. 2d 230, the denial of enforcement of a subpoena issued by the Veterans Administration was affirmed, as the subpoena was found, on the facts, to reach unreasonably far back in time.

Three cases involve the rights of third persons to protection where the administrative agency is authorized to investigate another directly. The question presented is whether a general, rather than specific, demand allows the third person to raise questions of personal privilege and avoid disclosure which might tend to incriminate him. Enforcement of a Civil Aeronautics Board subpoena was reversed and the case remanded in *Hermann* vs. *Civil Aeronautics Board*, 9 Cir., 237 F. 2d 350, in part because the District Court failed to pass upon privilege asserted by third parties to the proceeding in behalf of documents relating "entirely to their personal affairs, such as their income tax reports." A similar result obtained in Local 174, International Brotherhood of Teamsters, 9 Cir., No. 14746, filed November 8, 1956, where the subpoena issued by the Internal Revenue Service to the Local, a third party to the tax investigation of another, was so broad on its face as to compel a holding that the District Court had not given consideration to the right of privacy of the Local. Likewise, this Court, in *Hubner* vs. *Tucker*, 9 Cir., No. 14704, filed January 30, 1957, set aside a contempt order imposed against defendant, a third party to a tax investigation for failure to obey the

any personal privilege or right is made. The issue is essentially one of authority to determine jurisdictional questions.

There are three separate questions in this case which were before the trial court. First, did the Federal Trade Commission have any authority to demand production of any papers whatsoever from Fireman's Fund Indemnity Company? Second, has the Commission any power over the subject matter of the inquiry? Third, was the subpœna definite enough to show all the material demanded was relevant to any inquiry which the Commission was empowered to conduct?

The question of whether either Indemnity or Crafts was covered by an act, regulation or statute personally was really not involved or, perhaps we may rather say, was entirely a dependent proposition which could only be solved by a determination of whether Congress had precluded the Commission from acting in the particular field. The trial court refused to consider the scope of authority of the Commission, the relevancy of the testimony or documents to any inquiry which the agency had the authority to conduct and the arbitrary nature of the demand considering that Congress may have prohibited action or

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subpoena issued by the Internal Revenue Service, and remanded the case. It was held that the blanket demand, by its very breadth, precluded the defendant from effectively raising the defense of unlawful search and seizure and the privilege against self-incrimination.

It should be noted that, in all these cases, there was no question raised as to the broad legal authority of the various agencies involved to issue subpoenas, and to have them enforced: "coverage" was not an issue in any of them. Rather, the issues raised in these enforcement proceedings concern more particular problems, such as what may be subpoenaed, from whom, and in what manner.

at least closely circumscribed action in this field of interstate commerce by the Commission.

But at the threshold of any inquiry a District Court must consider not only its own jurisdiction, but also the authority of any agency to act which seeks relief before it.[4] The idea that a fiat of an administrative agency that it possesses authority to act in a particular field is sacrosanct is illusory. In certain statutes, Congress has permitted an agency to determine conclusively whether a certain person or state of facts comes within the orbit of its administrative power.[5]

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[4] *Jones* vs. *Securities and Exchange Commission*, 298 U. S. 1. A leading "coverage" case indicates that evidence sought by subpoena cannot be "plainly incompetent or irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corporation* vs. *Perkins*, 317 U. S. 501, 509. As the District Court stated in Application of Barnes, 116 F. Supp. 464, 467, ultimately affirmed sub. nom. *United States* vs. *Minker*, 350 U. S. 179, "Subpenas should not issue on hit or miss legal grounds." See also cases where enforcement was denied on analogous legal grounds: *Cudahy Packing Co.* vs. *Holland*, 315 U. S. 357 (improper delegation of subpoena power); cf. *Ellis* vs. *Interstate Commerce Commission*, 237 U. S. 434; *Harriman* vs. *Interstate Commerce Commission*, 211 U. S. 407 (witnesses not required to answer questions outside the scope of the statutory authority of the Commission).

[5] See, for example, *Endicott Johnson Corporation* vs. *Perkins*, 317 U. S. 501, so holding as to the Walsh-Healy Public Contracts Act, 41 U. S. C. A. § 38, and *Tobin* vs. *Banks and Rumbaugh*, 5 Cir., 201 F. 2d 223, cert. den. 345 U. S. 942, so holding as to the Fair Labor Standards Act, § 9, 29 U. S. C. A. § 209.

The trial court was impressed with the rationale of these cases and treated the question raised in the instant case as one of "coverage." The government has cited a wealth of cases on this point, which have properly treated "coverage" questions following the same line of reasoning. These are not applicable here. In each of them Congress had vested an agency with regulatory power in a broad field, and the particular question was whether some individual or entity was within or without the field. The agency was given primary jurisdiction to reach

But those instances are not analogous to the instant proceeding.

Here the trial court places an imprimatur upon each demand of the subpoena without any consideration of the limitations upon the power of the agency to act. However, Congress had passed an act specifically stating its position with regard to the business of insurance, which reads in part:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically related to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by

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a tentative conclusion and subpoenaed records to prove the fact of coverage. But here Congress has severely circumscribed, if not destroyed the power of any agency to enter the field, if the regulation by a particular state is sufficiently comprehensive.

State law." McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33, 15 U. S. C. A. §§ 1011–1012.

In the face of this statute, the Commission has decided by a vote of three to two that it has a broad and uncontrolled power to regulate the business of insurance.[6] This result seemingly was reached by rationalization from the terms of the statute. However, it is not the intention to attempt to construe the statute because the demand of the subpoena is so broad and general that such a holding is not compelled here.

The appellant Crafts, contrary to the Commission, claims that California is the state of origin of the company and that the operations of the company with regard to advertising are completely regulated by the law of that state.[7] It is urged that California has the complete control of the existence of the corporation and may revoke its charter for violations of the laws, even if the particular act may have occurred in another state, federal district or foreign country.[8] Nor, it is claimed, is this a dry letter of the enactment, since the proper officers do enforce such regulations upon violations outside the state.[9] Furthermore, it is said, practically every state in the Union and the District of Columbia have statutes which regulate and control the advertising of the persons and corporations, domestic or foreign,

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[6] *In the Matter of American Hospital and Life Insurance Company*, F. T. C. Docket No. 6237, decided April 24, 1956.

[7] Cal. Stat. (Insurance Code) (West, 1956) §§ 780, 781.

[8] Cal. Stat. (Insurance Code) (West, 1956) §§ 704, 783.5.

[9] Appellant draws our attention to the pending case of *Foster* vs. *McConnell*, Docket No. 422572, in Superior Court at San Francisco, in which this application of the statutes is being tried.

doing insurance business in the state or district.[10] It is urged upon us that these are purely questions of law and that therefore it is incumbent upon this Court to decide now just what are the limitations, if any, upon the power of the Commission. We hold it improper for us to rule upon the questions thus presented in this ancillary case except insofar as these may affect breadth of the demand of the subpoena.

That there are limitations upon the power of the Commission in this field is beyond all doubt. It is apparently conceded by everyone that the agency had no power to inquire into the advertising of this corporation in the State of California. Indeed, it is stated that some such limitation was placed upon the claim to discovery by the trial examiner and affirmed by the Commission. It has also been stated by counsel that the agency has no interest in discovery as to this area. But this Court cannot consider this as a supposition or admission. The trial court enforced the subpoena as it read without qualification or exception. This was error.

The entire complaint in the proceeding is predicated upon the overriding authority of the Commission to regulate and punish advertising in the business of insurance which may affect interstate aspects thereof in accordance with the ruling by that body, split three to two.[11]

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[10] Almost four-fifths of the states have adopted, with minor variations, the so-called "Model Act," which was drafted by the National Association of State Insurance Commissioners and provided for the regulation of trade practices. See R. C. W. §§ 48.30.010–48.30.250. The remaining states all have statutory provisions regulating to various degrees deceptive representations or advertising.

[11] *In the Matter of American Hospital and Life Insurance Company*, F. T. C. Docket No. 6237, decided April 24, 1956.

When the Congress passes an act which is intended to cure an evil legislatively designated and defined, the courts will not circumscribe the sphere of action of the agency. Here the Commission acts within the scope of power conferred by a general statute which purports to confer authority "to prevent * * * corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [12] This Act covers a broad field and unquestionably sets out a legislative purpose of great public importance. As such, the legislation has been upheld and broadly enforced by the courts. Yet even the Commission will not contend that this legislation is of universal application to all corporations, persons and partnerships in the United States. Indeed, before the decision of the Supreme Court of the United States in *United States* vs. *South-Eastern Underwriters Association,* 322 U. S. 533, the Commission had never attempted to exercise this authority against insurance companies. If such an attempt had been made before that time, surely no claim could have been made that an insurance company could not resist the investigation at the outset on ground that the Commission had no jurisdiction. This consideration highlights the proposition that the primary question for a court here is jurisdictional and does not involve coverage.[13]

This point serves to distinguish all legislation and all decisions thereon where the particular entity may or may not be as a matter of fact within the general sweep of power conferred.[14] Where Congress has conferred broad authority upon an agency to exercise

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[12] Federal Trade Commission Act, § 5 (a) (6), as amended July 14, 1952, 66 Stat. 632, 15 U. S. C. A. § 45 (a) (6).

[13] See cases at Note 4, supra.

[14] See cases at Note 5, supra.

regulatory power over a legislative classification such as interstate commerce, the question as to whether the entity or person subpoenaed is within the classification and thus subject to administrative control is one of "coverage." As it is a question of fact, the agency usually has complete power of determination, and the courts cannot interfere. As to many fields, the Commission has such unhampered power in regulation of interstate commerce.

Here Congress had plenary power to refuse to occupy the field of regulation of insurance in interstate commerce. Whether the refusal was complete with a clause of re-entry left for future contingency or whether a considerable area was left for present regulation by the Commission, we do not attempt presently to decide. But the determination involves a question of law. The jurisdiction of the Commission certainly was drastically circumscribed in this field in any event. How far the prohibition has gone is dependent upon a construction of this act of Congress and the statutes of the several individual states regulating insurance. It may be conceived the actual practice in insurance regulations of a particular state may become pertinent eventually, but such matter will still relate to jurisdiction of the Commission and not to "coverage."

Patently, the power of the Commission to act at all is based upon the exception contained in a proviso.[15] The distinct purpose of Congress, emphatically set out in the act, was to abandon the field of regulation to the states, where the power traditionally lay.[16] Ju-

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[15] McCarran-Ferguson Insurance Regulation Act, § 2 (b), as amended 61 Stat. 448, 15 U. S. C. A. § 1012 (b), quoted in text, supra.

[16] McCarran-Ferguson Insurance Regulation Act, § 1, 59 Stat. 33, 15 U. S. C. A. § 1011, quoted in text, supra.

dicial knowledge may be taken of the fact that, in view of the responsibility which lay on the individual states to regulate this business when by hypothesis there could be no federal regulation,[17] the field was well covered both in the states of origin of the corporations and in the states of dissemination of advertising and of written policies. In the time zone which Congress deliberately created for the purpose,[18] state legislation to fill lacunae in regulation was widely enacted, as was the intention. A major portion controls the corporation in the place of its incorporation or where it has its principal place of business. But it must not be forgotten that many states scrupulously control the media of dissemination of policies, such as brokers, agents and advertising of foreign corporations engaged in the insurance business within the territorial jurisdicton thereof. In initiating a scheme of regulation of strictly interstate negotiation and sale of insurance policies, it might have been well for the Commission to establish as to two different states what the limits of such business are. Of course, this Court is not attempting to set boundaries to the jurisdiction of the Commission, but rather to seek a solution for the problem at bar.

The trial court should then have considered the second proposition. It should have found affirmatively upon the question whether the broad demand for the testimony and documents covering the whole field of

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[17] Before the decision in *United States* vs. *South-Eastern Underwriters Association*, 322 U. S. 533, rehearing denied 323 U. S. 811, it had been consistently held for many years that insurance was not "commerce." *Paul* vs. *Virginia*, 75 U. S. 168, 183; *New York Life Insurance Co.* vs. *Deer Lodge County*, 231 U. S. 495.

[18] McCarran-Ferguson Insurance Regulation Act, § 2 (b), as amended, 61 Stat. 448, 15 U. S. C. A. § 1012 (b), quoted in text, supra.

intrastate operation in California [19] and that in other states, which respectively attempted to legislate with regard to advertising in the field of insurance, was arbitrary and unreasonable or not.

The decisive point, however, encompasses all these phases. There was no examination by the District Court of the relevancy and pertinence of the testimony and documents demanded to any matter into which the Commission was empowered by statute to inquire.[20] Section 6 of the Administrative Procedure Act provides in part:

> "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law * * *." Administrative Procedure Act, § 6 (c), 60 Stat. 240, 5 U. S. C. A. § 1005 (c).

It may be incumbent upon the trial court to place limitation upon the subpoena. So only could the demand be sustained "to the extent that it is found to be in accordance with law." This Court is of the opinion that the subpoena was so broad on its face and the implications of the complaint upon which it was based are so farreaching that it would have been almost impossible to frame appropriate phrases of limitation. If the subpoena be enforced without regard to the relevance of the testimony sought to the areas over which the Commission has established jurisdiction, the ruling would not only be unfair to the company, but

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[19] See *Federal Trade Commission* vs. *American Tobacco Co.*, 264 U. S. 298, 307.

[20] Federal Trade Commission Act, § 9, 38 Stat. 722, 15 U. S. C. A. § 49.

could be quoted as a precedent for an unlimited authority for investigation and discovery in the field of insurance, whether intrastate or interstate. The agency could have limited the subpoena itself so as to have raised the question of its power by particularizing the demand. If the demand had been confined to records relevant to interstate commerce with another single state such as Montana, where there is probably the least regulation of advertising by a foreign corporation in the insurance area,[11] a much closer question would have been presented. But decisions as to relevance as well as those as to reasonable or arbitrary exercise of power must have bases in facts.

We hold that not only did the District Court have jurisdiction to decide, but also that it is required to decide whether the statutes have withdrawn the power from the Commission to regulate the particular area of interstate commerce in insurance solely when the court is moved to enforce a subpoena so definite in demand for specific books or papers that the scope of authority may be defined. Since this present subpoena demanded in mass all books, papers and records of the Indemnity Company including those relating to the intrastate business of that company in California, wherein Fireman's Fund was incorporated, the order of enforcement was too broad. While it may be the duty of the court to enforce a subpoena insofar as the demand be "in accordance with law,"[12] here the phraseology was such that the court had no means of segregation of items, if any, over which the

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[11] And, even in Montana, there is general legislation governing false statements in advertising. Montana Revised Code, § 94–1819, which would seem to be specifically applicable to "any insurance company * * * organized in this state, or in any other state." Montana Revised Code, § 40–1106.

[12] Administrative Procedure Act, § 6 (c), 5 U. S. C. A. § 1005 (c), quoted supra.

Commission had jurisdiction from those as to which Congress had explicitly denied them authority. *Hale* vs. *Henkel,* 201 U. S. 43; *Federal Trade Commission* vs. *American Tobacco Company,* 264 U. S. 298. The subpoena in the instant case is not sufficient to present the question of jurisdiction, if any, remaining to the Commission. The proceeding should be dismissed.

Reversed.

(Endorsed:) Opinion Filed Feb. 27, 1957.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 14972

JAMES F. CRAFTS, APPELLANT

vs.

FEDERAL TRADE COMMISSION, APPELLEE

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is reversed.

(Endorsed:) Judgment.
Filed and Entered: February 27, 1957.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX C

In the Supreme Court of the United States

No. ——, October Term, 1956

FEDERAL TRADE COMMISSION, PETITIONER

vs.

JAMES F. CRAFTS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27th, 1957.

/sgd/ WM. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of May, 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

Office - Supreme Court, U.S.
FILED
AUG 2 5 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 229

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

JAMES F. CRAFTS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

CHRISTOPHER M. JENKS,
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
405 Montgomery Street, San Francisco 4, California,
Attorneys for James F. Crafts, Respondent.

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In the Supreme Court
OF THE
United States

October Term, 1957

No. 229

Federal Trade Commission,	*Petitioner,*
vs.	
James F. Crafts,	*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

The respondent James F. Crafts believes that the decision of the Court of Appeals for the Ninth Circuit is correct and sees no reason for a writ of certiorari in this matter.

QUESTIONS PRESENTED.

This case involves Public Law 15, 79th Congress (59 Stat. 33, 15 U.S.C. 1011-1015) sometimes called the "Mc-

Carran Act" or the "McCarran-Ferguson Act", which says that the Federal Trade Commission Act is applicable to the business of insurance "to the extent that such business is not regulated by State law."

Query: Does the Federal Trade Commission have jurisdiction over advertising of accident and health insurance in any state where such advertising is "regulated by State law"?

This case also involves Section 6(c) of the Administrative Procedure Act (60 Stat. 240, 5 U.S.C. 1005(c)) which says that an administrative subpena shall be sustained "to the extent that it is found to be in accordance with law."

Query: Should a District Court enforce a Federal Trade Commission subpena merely because the subpena was issued with proper formality, even if the Commission is exceeding the limit of its statutory authority?

STATEMENT OF CASE.

This case involves an attempt by the Federal Trade Commission to regulate the advertising of accident and health insurance by Fireman's Fund Indemnity Company, of which Mr. Crafts is president. Fireman's Fund is a California corporation licensed to and doing business in all 48 states, and the District of Columbia, (R. 36). The Commission claims the right to regulate advertising used by Fireman's Fund in the District of Columbia and in every state except California. The Commission excludes California on the theory that the Commission

has no jurisdiction in California over a California company. However, despite the fact that the Commission's right to regulate the business of insurance is limited "to the extent that such business is not regulated by State law," the Commission contends that it can regulate advertising used by Fireman's Fund in any state other than California regardless of regulation by local State law, and may regulate advertising used in California by any company organized outside of California even though such company is regulated in California by California law.

The subpena served on Mr. Crafts would require him to testify regarding, and to produce evidence of, the company's accident and health insurance in all 48 states and the District of Columbia (R. 20-23). The Commission, on a motion to quash, limited the subpena by excluding California. However, the order of the District Court enforcing the subpena was not so limited, and includes California.

The subpena was not issued as a part of any investigatory proceeding, but instead is a part of an adjudicative proceeding commenced by the issuance and service of a formal complaint under the Commission's Rules of Practice for Adjudicative Proceedings. This complaint makes specific charges against Fireman's Fund (which the company denies), gives notice of hearing, and sets forth a form of regulatory order which the Commission would issue in the event of no contest by the Company (R. 8-20).

Mr. Crafts appeared at the hearing, was sworn and identified himself (R. 33-34). Mr. Crafts respectfully

refused to answer further on the grounds the Commission had no jurisdiction (R. 42-43) and counsel for Fireman's Fund stated that the refusal was based upon the belief that the Federal Trade Commission had no jurisdiction to regulate advertising of accident and health insurance and therefore no jurisdiction to conduct the proceeding or to issue the subpena (R. 34-38). The Commission filed an application with the District Court to enforce the subpena (R. 3-7) and the District Court did so (R. 46-47), refusing to consider the question of jurisdiction (R. 70-71). Enforcement was stayed, pending the appeal (R. 97) and upon appeal the Ninth Circuit reversed, pointing out that this is a case of "jurisdiction" as a matter of law and not a case where "coverage" might depend upon the very facts sought by the subpena.

Advertising of accident and health insurance is regulated everywhere by "State law." Most of the states have a so-called "Model Act" which was suggested by the National Association of Insurance Commissioners during the three year moratorium which Public Law 15 provided for the purpose of allowing the States to adopt their own legislation. The other States and the District of Columbia have similar statutes, all of which prohibit false advertising. It seems obvious that whether advertising in a particular state is regulated by "State law" is a matter of judicial notice and does not depend upon any facts which could be elicited by testimony from Mr. Crafts or from the documents required by the subpena.

The Ninth Circuit did not attempt to analyse the laws of each of the 48 states and of the District of Columbia, but did point out the distinct purpose of Congress em-

phatically set forth in Public Law 15 "to abandon the field of regulation to the states where the power traditionally lay." (Petition 32). The Ninth Circuit then went on to say that the subpena in this case, calling for evidence of activities everywhere without segregation of the items, if any, over which the Federal Trade Commission might have jurisdiction, was too broad properly to present the question to the District Court (Petition 33). It pointed out the obvious fact that the Federal Trade Commission could have presented the question of its power by particularizing the demand. The subpena did not do so, and therefore the Ninth Circuit reversed and ordered the proceedings below dismissed.

The petition suggests, at page 7, that a subpena calling for advertising, insurance policies, contracts, agreements, correspondence, records and books of account in connection with accident and health insurance in all 48 states and the District of Columbia for the years 1953, 1954 and most of 1955 is not "burdensome". The Petitioner attempts to support this suggestion by stating that Respondent had all the material in the hearing room in two brief cases. This is a misstatement. Counsel for respondent did have brief cases in the hearing room which he stated contained the "available" material (R. 34). The writer of the petition for certiorari misconstrues the word "available". It does not mean "all" the records, but merely those records which were available in San Francisco at that time.

ARGUMENT.

The Commission concedes (as it must) that lack of lawful purpose is an appropriate defense to a proceeding to enforce an administrative subpena (Petition 7). The Commission attempts to avoid this basic legal principle by saying the Federal Trade Commission Act is applicable to the business of insurance "under some circumstances," but the Commission does not say "what circumstances" might apply to the present case.

The same contention was used in an attempt to support the subpena in *Jones v. Securities and Exchange Commission*, 298 U.S. 1. The Securities and Exchange Commission argued that the order enforcing the subpena "may rest upon the general power to conduct investigations" (298 U.S. 25). The Court rejected this argument and quashed the subpena, pointing out the S.E.C. had no jurisdiction over the particular proceeding in which the subpena had been issued. The same contention was necessarily rejected in *United States v. Minker*, 350 U.S. 179. Immigration officials have general power to conduct investigations but the subpenas were quashed when the officials attempted to exceed their authority in a particular case.

Petitioner also attempts to avoid this basic legal principle by saying we have a question of "coverage" and suggests that the Federal Courts must enforce such an administrative subpena regardless. There are two answers to this argument.

Federal Courts do not enforce administrative subpenas "regardless". Even the cases which Petitioner cites did not do this. In *Endicott-Johnson Corp. v. Perkins*, 317

U.S. 501, the Court considered the "lawful purpose" of the inquiry (317 U.S. 509). And in *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, the court pointed out, at page 216, that Mr. Walling, the administrator, must not act "in excess of his statutory authority."

The second answer is that the present case does not involve "coverage" as a question of fact, but "jurisdiction", as a matter of law. In *Endicott-Johnson Corp. v. Perkins,* supra, agency authority depended upon the very facts sought by the subpena, i.e., whether certain employees worked on a government contract or on a private contract. Similar factual questions underlie all of the so-called "coverage" cases. In the present case the Federal Trade Commission Act is applicable to the business of insurance only "to the extent such business is not regulated by State law." Federal Courts take judicial notice of state statutes. Jurisdiction of the Commission to regulate advertising of accident and health insurance is purely a matter of law depending on state statutes, and does not involve any question of fact.

It was suggested by the District Court in the present case that Section 6(c) of the Administrative Procedure Act precludes judicial consideration of jurisdiction in an application to enforce an administrative subpena. However, the Administrative Procedure Act did not remove the constitutional limitation on agency action. Instead, as Mr. Justice Jackson said in *United States v. Morton Salt Co.,* 338 U.S. 632, 644:

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators

> whose zeal might otherwise have carried them to excesses not contemplated in the legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

The Court of Appeals for the Ninth Circuit, in our opinion, correctly held that an attempt to enforce an administrative subpena presents a justiciable case or controversy in which courts act as courts and not as mere adjuncts of administrative agencies. This is particularly true when (as here) jurisdiction is a matter of law and not a question of fact.

Civil Aeronautics Board v. Hermann, 353 U.S. 322, reversing *per curiam* 237 F. 2d 359 (C.A. 9), cited on page 7 of the Petition, has no bearing on any of the issues in the present case. It involved the relevancy of documents to the issues of the Board's complaint. The present case involves jurisdiction to conduct the proceeding at all. There is no similarity between the two cases.

THERE IS NO CONFLICT OF DECISION.

Each case which has considered Public Law 15 has said that the Congress meant to permit state control of the business of insurance. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 upheld Public Law 15 as the basis for a state tax which discriminated against interstate commerce. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413, said that the "exclusive purpose" of Public Law 15 was to counteract any adverse effect which the decision

in *United States v. South-Eastern Underwriters Association,* 328 U.S. 533, "might be found to have on State regulation of insurance." *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310, 319 said, the McCarran Act "was designed to assure that existing state power to regulate insurance would continue." In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange,* 181 F. 2d 174, 176, the Court of Appeals for the Eighth Circuit said, "The purpose of the McCarran Act was to permit the states to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce." In *United States v. Sylvanus,* 192 F. 2d 96, 100, the Court of Appeals for the Seventh Circuit said, "It is clear, we think that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several states."

In the field of advertising of accident and health insurance there have been three (and only three) Court of Appeals decisions, all three of them against the Federal Trade Commission. The Court of Appeals for the Ninth Circuit, in the present case, points out that limitation upon the power of the Commission "is beyond all doubt" (Petition 30). The Court of Appeals for the Fifth Circuit in *The American Hospital and Life Insurance Company v. Federal Trade Commission,* 243 F. 2d 719, decided April 9, 1957, involving advertising in fourteen states which have the so-called "Model Act", held that the Commission "was without jurisdiction". The Court of

Appeals for the Sixth Circuit, in *National Casualty Company v. Federal Trade Commission,* ..... F. 2d ....., decided June 6, 1957, agreed and went on to say that the Commission was without jurisdiction to regulate the business of insurance "in those states where such business is regulated by State law." Admittedly the *National Casualty* case was remanded to the Commission "for further proceedings consistent with this opinion." The Commission, in order to be consistent with the opinion, must at least admit no jurisdiction in the states which have the so-called "Model Act" and, as we said before, all other states have statutes in one form or another regulating advertising of accident and health insurance.

IMPORTANCE OF THE QUESTION.

Petitioner suggests that the enforcement of the subpena issued by the Commission in a proceeding against an insurance company is a matter of major importance and argues that if the decision in the present case is allowed to stand it might encourage resistance to subpenas in the cases pending against other insurance companies. If the Commission has no jurisdiction to regulate the advertising of accident and health insurance in those states where such advertising is regulated by State law, the Commission should not complain about resistance to subpenas issued in excess of authority.

It is more important to reassert the statement of the Congress "that the continued regulation and taxation by the several States of the business of insurance is in the public interest" (Section 1, Public Law 15, 79th Con-

gress). It is also important to affirm Section 6(c) of the Administrative Procedure Act as a "statutory limitation upon the issuance or enforcement of subpenas in excess of agency authority or jurisdiction" (Senate Committee Report, Nov. 19, 1945; House Committee Report, May 3, 1946. Administrative Procedure Act, Legislative History, Senate Document No. 248, 79th Congress, 2d Session, pages 206 and 265).

CONCLUSION.

The decision below is in accord with the decisions which have considered Public Law 15. It is also in accord with the decisions which have quashed administrative subpenas issued in excess of agency authority or jurisdiction. Under these circumstances, we see no reason for certiorari.

Petitioner, as we pointed out before, concedes that lack of lawful purpose is an appropriate defense to an application to enforce an administrative subpena. Yet, on page 10, Petitioner requests this Court to preclude consideration of this defense in the present case by suggesting that the judgment below be reversed "without further briefs or argument." If Public Law 15 means what it says, the Commission cannot regulate advertising of accident and health insurance already regulated by State law. If such advertising is regulated everywhere by State law, as we contend, the Commission has no statutory authority to regulate it anywhere. Denial of certiorari will assure judicial consideration of this appro-

priate defense before any subpena is enforced by the District Court in the present case.

Dated, August 26, 1957.

Respectfully submitted,

CHRISTOPHER M. JENKS,

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,

Attorneys for James F. Crafts, Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 229

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

JAMES F. CRAFTS, *Respondent.*

PETITION FOR REHEARING.

CHRISTOPHER M. JENKS,
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
405 Montgomery Street, San Francisco 4, California,
Attorneys for James F. Crafts, Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 229

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
JAMES F. CRAFTS,
Respondent.

PETITION FOR REHEARING.

JAMES F. CRAFTS, respondent in the above case, petitions for a rehearing of the summary decision of this Court entered on October 14, 1957. The petition is filed pursuant to paragraph 1 of Rule 58. It is a petition for rehearing from the per curiam reversal; not a petition for rehearing from the order granting certiorari.

OPINIONS BELOW.

The District Court did not issue a written opinion but the entire colloquy between court and counsel appears in

the printed record at pages 62-97. The opinion of the Court of Appeals is now reported at 244 F.2d 882.

JURISDICTION.

This Court took jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

Public Law 15, 79th Congress (sometimes called the "McCarran Act" or the "McCarran-Ferguson Act") provides that the Federal Trade Commission Act shall be applicable to the business of insurance only "to the extent that such business is not regulated by State law." The question presented is whether, in view of Section 6(c) of the Administrative Procedure Act, a district court may determine in a subpena enforcement proceeding if Public Law 15 has divested the Federal Trade Commission of authority and jurisdiction over practices in the insurance business which are already regulated by State law.

The Court will recall that Public Law 15 is the aftermath of *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, and that the Congressional purpose "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." (*Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429.)

STATUTES INVOLVED.

Section 6(c) of the Administrative Procedure Act (60 Stat. 240, 5 U.S.C. 1005(c)) provides, in part:

> "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law • • •."[1]

Section 2 of Public Law 15, 79th Congress (59 Stat. 34, as amended, 61 Stat. 448, 15 U.S.C. 1012, provides in part:

> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) • • • That after June 30, 1948 • • • the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."[2]

STATEMENT.

On May 11, 1955 the Federal Trade Commission issued a complaint against Fireman's Fund Indemnity Company seeking to regulate advertising used by Fireman's Fund

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[1]The Federal Trade Commission Act and the Commission's enforcement procedures are subject to the Administrative Procedure Act as held in *United States v. Morton Salt Company*, 338 U.S. 632.

[2]The purpose of the date, June 30, 1948, was to provide a three-year moratorium within which the several States could enact suitable regulatory statutes.

in connection with the sale of accident and health insurance policies (R. 8-20). Fireman's Fund answered (R. 52-62) and Mr. Crafts, its President, was subpenaed to testify at the hearing and to produce certain books and records (R. 20-23). Mr. Crafts appeared at the hearing but refused to testify or to produce any records on the ground that, under Public Law 15, the Federal Trade Commission had no jurisdiction over insurance advertising already regulated by State law (R. 33-38).

The Commission applied to the District Court for the Northern District of California for an order enforcing the subpena, and the order was issued without consideration of the jurisdictional issue (R. 46-47). On appeal the Court of Appeals held that the jurisdiction of the Commission had been substantially limited by Public Law 15 and that the District Court should have considered the issue (244 F.2d at 891). However, since the Court deemed the subpena so broad that the issue was not properly presented for decision, it ordered the proceeding dismissed (244 F.2d at 895). The Solicitor General and the Commission then petitioned this Court for a writ of certiorari and, on October 14, 1957, this Court granted certiorari and summarily reversed the decision of the Court of Appeals, citing *Endicott-Johnson Corp. v. Perkins*, 317 U.S. 501, and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186.

REASONS FOR GRANTING A REHEARING.

We recognize the statistical odds against a rehearing but we believe there are cogent reasons for a rehearing

of the per curiam reversal in this case. The summary decision based upon cases decided prior to the Administrative Procedure Act appears to conflict with the unequivocal Congressional policy as set forth both in the language and in the extensive legislative background of Section 6(c) of the Act.

Further, two related cases are now pending on petitions for certiorari presenting the direct questions of whether and to what extent Public Law 15 has divested the Federal Trade Commission of authority to regulate insurance advertising already regulated by State Law. These cases are *Federal Trade Commission v. National Casualty Company,* October Term 1957, No. 435, and *Federal Trade Commission v. The American Hospital and Life Insurance Company,* October Term 1957, No. 436.[3] Since the effect of Section 6(c) of the Administrative Procedure Act was not mentioned in the Government's petition for certiorari in the present case nor in the per curiam opinion and since the issue in the present case will

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[3]Although the issue of the effect of Public Law 15 is presented in most of its aspects in Nos. 435 and 436, certain peculiarities of California law (under which Fireman's Fund is incorporated) present special problems in the application of Public Law 15. California has not adopted the so-called "Model Act" proposed by the National Association of Insurance Commissioners to satisfy the state regulation requirement of Public Law 15. However, California has a broad statute regulating insurance advertising which has been construed by the Insurance Commissioner and Attorney General of California as covering advertising used by California insurance companies both within and without the State. Fireman's Fund therefore has taken the position that its advertising is regulated everywhere by California law, and is not subject to Federal Trade Commission regulation without regard to the existence of regulatory statutes in other states. We believe that briefs and argument on this matter would be of assistance to the Court if certiorari should be granted in these other cases.

be controlled or at least affected by the disposition of the other two cases mentioned above, we believe that the Court may well consider it appropriate to grant this petition for rehearing so that all three cases can be considered together (*Cf. Pickett v. Union Terminal Company*, 314 U.S. 704).

ARGUMENT.

It has been Fireman's Fund's position throughout the proceeding that the issue presented is not one of "coverage" within the rationale of *Endicott-Johnson Corp. v. Perkins*, supra, and *Oklahoma Press v. Walling*, supra. We have contended that the statutory authority (or "jurisdiction") of the Federal Trade Commission, as limited by Public Law 15, does not permit the filing of a complaint attempting to regulate transactions in the business of insurance which are already regulated by State law, or permit the issuance of a subpena requiring the production of evidence regarding such transactions. It is our view that the issue thus presented is one of irrelevancy "to any lawful purpose" of the Commission (317 U.S. at 509) or of acts "in excess of [the Commission's] statutory authority" (327 U.S. at 216), and accordingly we have argued, and the Court of Appeals held (244 F.2d at 891) that the coverage cases are distinguishable.

In view of this Court's per curiam disposition of the case, we shall not now reargue the possible differences between "coverage" and "jurisdiction". We take the Court's decision to mean that the issue presented to the courts below, however denominated, seems to be within

Endicott-Johnson and *Oklahoma Press* and is therefore the type of issue which under these cases was to be left to administrative determination in the first instance. But the Administrative Procedure Act was adopted since the decisions in those cases, and Section 6(c) of the Act apparently was intended to affect their scope. The situation is not unlike *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, where the Court considered the effect of the Administrative Procedure Act and recognized a change in the duty of Courts of Appeal when called upon to review orders of the National Labor Relations Board. The opinion discusses the legislative history and points out that Congress expressed a "mood" by oratory and by legislation—a mood which must be respected "even though it can only serve as a standard of judgment and not as a body of rigid rules assuring sameness of application." (340 U.S. at pp. 487-488.) We think Congress expressed a similar mood in Section 6(c) regarding judicial enforcement of administrative subpenas.

This Court has not previously considered Section 6(c). However, Section 6(c) recognizes the right to contest the enforcement of an administrative subpena and sets forth new standards for judicial enforcement by providing that upon such a contest the Court shall sustain the subpena "to the extent that it is found to be in accordance with law."

These new standards may not affect earlier decisions viewed in the light of factual situations under which they arose. But now Congress has been more specific in setting forth the duty of the district court when called upon

to enforce an administrative subpena and has left no doubt regarding the type of defenses which the district court should consider.[4]

The summary reversal in the present case seems to ignore these standards and requires enforcement of the subpena merely because it was issued with proper formality. This seems to be directly contrary to the Congressional intent as expressed in the legislative history of Section 6(c). This legislative history is extensive; the important parts are set forth in the 423 pages of Senate Document No. 248, 79th Congress, 2nd Session:

Representative Walter, one of the sponsors in presenting the Committee Report to the House pointed out that this legislation was under consideration for more than 10

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[4]In *Tobin v. Banks and Rumbaugh*, 201 F.2d 223 (C.A. 5), cert. den., 345 U.S. 942, the Court of Appeals for the Fifth Circuit held that Section 6(c) was not intended to change the law set forth in *Endicott-Johnson* and *Oklahoma Press* as applied to a factual and legal issue exactly the same as that considered in *Oklahoma Press*. In reaching this result the Court of Appeals relied chiefly on the fact that predecessors of the bill which became the Administrative Procedure Act had contained a provision to the effect that in subpena enforcement proceedings the Court should "determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency." Noting the omission of this phrase and the substitution of the phrase "in accordance with law", the Court stated that it could not "assume that this deliberate substitution of language in view of the existing law, was not intended to define with exactness the limits of the inquiry in judicial enforcement proceedings". (201 F.2d at 226.) Presumably the Court overlooked the statement made in connection with the Senate Committee Print of the bill finally enacted, to the effect that the substituted language meant the same thing as the language replaced (Senate Document 248, p. 28, infra). In any event, the *Tobin* decision, which dealt with precisely the same issue as *Oklahoma Press*, is no authority for expansion of the *Oklahoma Press* principle. If the *Tobin* decision is to be construed as a broad holding that Section 6(c) left the law exactly where it found it, it plainly conflicts with the legislative history cited below.

years. He went on to say, "certainly no measure of like character has had the painstaking and detailed study and drafting. Both the legislative and executive branches have participated and private interests of every kind have had an opportunity to present their views." (Senate Document 248, p. 241.)

The legislative history of the phrase "in accordance with law" reflects some of the views of these private interests. It meets them by saying that "in accordance with law" means "that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency". The statement was made in connection with the Senate Committee Print of June, 1945. The full text is:

> "Private parties urge that after the word 'be' in the second sentence there be added, 'within the jurisdiction of the agency and otherwise', so that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency. It is felt that 'in accordance with law' as now stated [in the revised text set forth above] means that. If adopted, the suggestion should be understood as not authorizing a complete pretrial in the courts of factual issues committed to exclusively administrative determination; courts should, instead, do no more than satisfy themselves that, legally upon the general factual situation shown, the agency has jurisdiction of the specific subject matter involved." (Senate Document 248, p. 28.)

This interpretation as requiring the courts to satisfy themselves that the agency has jurisdiction continues throughout the legislative history; for example, House Committee Report of May 3, 1946, stated:

"The section constitutes a statutory limitation upon the issuance or enforcement of subpenas in excess of agency authority or jurisdiction, in connection with any agency function or authority. It does not mean that upon contest courts should enter into a detailed examination of the facts and issues which are committed to agency authority in the first instance; they should instead inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction. The section expressly recognizes the right of parties subject to administrative subpenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance. In such contests, the court is required to determine all relevant questions of law." (Senate Document 248, p. 265.) The Senate Committee Report of November 19, 1945 is substantially identical. (Senate Document 248, p. 206.)

On May 24, 1946, when Representative Walter made the official explanation of the entire Act to the House, he said:

"Subsection (c) of section 6 provides that, where Congress has authorized agencies to issue subpenas, private parties may secure them upon an equality with Government representatives and without any more than a general showing of relevance and reasonable scope of the information sought. Where administrative subpenas are contested, the court is to inquire into the situation and issue an order of enforcement only so far as the subpena is found to be in accordance with law. This is a definite statutory right and is applicable to subpenas of every kind addressed to any person under authority of any law. The effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public con-

tractors—see *Endicott-Johnson Corp. v. Perkins,* (317 U.S. 501, 507, 509, 510 (1943)), have been held inapplicable. Also, the term 'in accordance with law' does not mean that a subpena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpena is directed are within the jurisdiction of the agency which has issued the subpena." Senate Document 248, p. 363.)

At least one thing seems to be self-evident from this legislative history of Section 6(c). This one thing is the duty of a district court to act judicially and determine the authority or jurisdiction of the agency over the subject matter of the administrative proceeding before enforcing an administrative subpena. This is the logical inference from the fact that Section 6(c) is a statutory limitation upon the enforcement of subpenas in excess of agency authority or jurisdiction, from the statement that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency, from the fact that the term "in accordance with law" does not mean that a subpena is valid merely because issued with due formality, and because Section 6(c) expressly recognizes the right of the parties subject to administrative subpenas to contest their validity in the courts.

It is difficult to imagine how the Congress could have been more explicit in expressing its intent that appropriate defenses may be made to applications to enforce administrative subpenas and that a subpena should not be enforced merely because it was issued with proper

formality. We have contended from the beginning that the purpose of the Federal Trade Commission in the present case is unlawful and that the Commission is acting in excess of its statutory authority. The right to present these defenses was denied to us by the District Court and is denied to us again under the per curiam reversal. These defenses may be overruled, but we should have a right to present them for judicial determination.

We do not suggest that a district court should undertake a "complete pretrial" of any factual issues (Senate Document 248, p. 28, supra), or a "detailed examination of facts and issues which are committed to agency authority." (Senate Document 248, p. 265, supra.) We contend that, without a trial of any factual issues and without the production of any evidence whatsoever, a district court could and should hold that the Federal Trade Commission has no power to regulate advertising of accident and health insurance. The basis of this contention is that such advertising is "regulated by State law" in every jurisdiction in which Fireman's Fund does business and that, under Public Law 15, the Federal Trade Commission has been divested of all authority to regulate insurance advertising already regulated by State law.

If this is a question of "coverage", as the Government insists, it is not coverage of Fireman's Fund but rather coverage of the specific subject matter of the proceeding, i.e., insurance advertising already regulated by State law. This question of jurisdiction "of the specific subject matter involved" is one of the things which Congress said should be considered before an administrative subpena is enforced (Senate Document 248, p. 28, supra). It is one

of the "relevant questions of law" to be determined by the district court (Senate Document 248, p. 265, supra). And yet, as we said before, the per curiam reversal denies us the right to have this defense considered in the present case. The defense may be overruled but we should be permitted to present it. Any other result is contrary to the unequivocal statement that Section 6(c) "constitutes a statutory limitation upon the issuance and enforcement of subpenas in excess of agency authority or jurisdiction in connection with any agency function or authority." (Senate Document 248, p. 265, supra).

The petition for certiorari urged that judicial consideration of this question on an application to enforce a Commission subpena would preclude the Commission from developing facts upon which the Commission itself could make this determination. The immediate answer to this argument is that Public Law 15 is not factual. The Commission may regulate the business of insurance to "the extent that such business is not regulated by State law"; or, to put it in the reverse, the Commission cannot regulate insurance advertising which is already regulated by State law. The question as Senator McCarran put it is simply, "Is this practice regulated by State law? Not, is it effectively regulated, or is it wisely regulated; but simply is it regulated?" (94 Congressional Record No. 11, p. A 3214.)

It is a matter of judicial notice that over three-fourths of the States adopted a so-called "Model Act" drafted by the National Association of Insurance Commissioners for the purpose of precluding Commission regulation of insurance advertising and the remaining States (including

the District of Columbia) have statutes in one form or another regulating such advertising. This regulation by State law does not depend upon individual facts in individual cases. There are no facts to be developed by the Commission in this case or any other case under Public Law 15 upon which the Commission's authority to regulate insurance advertising might depend.

The judgment of the United States Court of Appeals for the Ninth Circuit in the present case did two things. First, it interpreted Section 6(c) as requiring a district court to consider agency authority before enforcing a subpena (244 F.2d, at page 891 and page 895). This portion of the judgment seems to be clearly in accord with the legislative history quoted above. However, since the Court of Appeals deemed the subpena so broad that the issue was not properly presented for decision, it ordered the proceedings dismissed. (244 F.2d at page 895). The per curiam decision of this Court, as we understand it, reverses on both grounds, and reinstates the original order of the district court enforcing the subpena. The district court's interpretation of Section 6(c) is now approved and the subpena will be enforced merely because it was issued with due formality. We think that such a sweeping rejection of explicit legislative history should not be made without a full hearing on briefs and oral arguments. Even if a full hearing still results in a reversal it could give us the rights which Congress apparently intended us to have and reinstate the proceedings with instructions to the district court to consider whether State statutes have divested the Commission of power to regulate insurance advertising.

Further, a rehearing in the present case would permit this case to be correlated with *Federal Trade Commission v. National Casualty Company*, October Term, 1957, No. 435, and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, October Term, 1957, No. 436. Both of these cases, as we said before, deal with the basic issue which we wish to present in our case; in other words, whether Public Law 15 is to be construed as divesting the Commission of jurisdiction over insurance advertising because of the enactment of State laws regulating such advertising. If certiorari should be granted in these two cases, all three cases might well be argued together.

CONCLUSION.

We respectfully request that a rehearing with full opportunity for briefs and oral argument be granted to prevent an interpretation of Section 6(c) which appears to be contrary to the intent of Congress as expressed in the legislative history quoted herein. Such a rehearing will also permit the Court to correlate this case with the related cases now pending on petitions for certiorari.

Dated, November 5, 1957.

Respectfully submitted,

CHRISTOPHER M. JENKS,
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for James F. Crafts, Respondent.

Certificate of Good Faith.

Christopher M. Jenks, counsel for Respondent James F. Crafts, hereby certifies that this Petition for Rehearing is presented in good faith and not for delay.

Dated, November 5, 1957.

Christopher M. Jenks.